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THE LAW
OF
PETROLEUM
AND
NATURAL GAS
WITH FORMS

BY
GEORGE BRYAN
of the Crawford County, Pennsylvania, Bar

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TO MY MOTHER

PREFACE.

IT may be well to call attention to one or two features of the plan of this book. First, it is not a treatise upon the law of Mines and Mining. The history of petroleum as an article of commerce of an importance in any degree commensurate with that of to-day, may be said to have commenced in 1860. The law affecting it must necessarily have extended over approximately the same period ; though in related points, arising in the law of coal and other minerals, recourse may be safely had to the authorities upon that general subject. But from the peculiar nature of oil and gas, questions absolutely new to the courts have arisen, eliciting remarks such as the following, in 1893, from the Supreme Court of Pennsylvania : "A new question, and one that is full of difficulty. We find ourselves upon a new road, without chart or compass to guide us, and we propose to move slowly." And again, in 1897 : "So far on in our inquiry we have a well-beaten path to travel, but from this point forward we are without any definite landmark to guide us." It has, therefore, been thought that an effort to supply such a chart by a presentation of the leading cases from the several courts which have made the subject one of special study, would not be unwelcome to the profession.

PREFACE.

Another feature to which attention is called is that it does not purport to be a treatise upon the subjects at the heads of the respective chapters any further than as they relate to oil and gas. Thus, the subject of Eminent Domain is considered only from the standpoint of the pipe lines, the fuel-gas companies and the private property owner, while for the general principles reference may be had to the standard treatises of Mills, Lewis and others. The writer's object has been the application to the particular field of principles well understood by the profession.

It may not be out of place to allude to a feature which will have impressed the reader upon the conclusion of his examination of the authorities, namely, the substantial uniformity of the law. It is not intended by this to convey the idea that there are no contradictory rulings; but the assertion is ventured that, in the law of no subject involving the immense property rights and diversified litigation incident to petroleum and natural gas, are there to be found so few overrulings by one court of its own decisions, so few differing interpretations by courts of last resort of the several States, and so little conflict of the rulings of the State courts with those of the Federal.

Full credit is given in the succeeding pages for the sources of law employed. From the standpoint of compilations, they were not numerous. The article of Mr. EVERETT W. PATTISON, of the St. Louis bar, upon "Mines and Mining Claims," 15 Am. & Eng.

PREFACE.

Cyclopædia of Law, 499, is a succinct statement of principles with appropriate authorities ; while the note to *Williamson vs. Jones*, 25 L. R. A., 222, contains a useful summary of the decisions in point. For the rest, recourse has been had to the reports of the individual cases, the arguments of counsel and the opinions of the courts.

The assistance of former Justice CHRISTOPHER HEYDRICK, of the Supreme Court of Pennsylvania, in the form of valued suggestions in the preparation of the work, is gratefully acknowledged.

GEORGE BRYAN.

TITUSVILLE, PENNA., *April*, 1898.

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- § 478 Evidence—admissions of agent.
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Addenda to Chapter III.

- § 28a The *quantum* of property of a life-tenant in an oil well.
- § 41a The right of way.
- § 41b The same—extinction by non-user.
- § 41c and 41d Drilling through coal for oil or gas.

CHAPTER I.

DEFINITIONS.

Sec. 1. Minerals.

A mineral is a fossil, or what is dug out of the earth. The term is said to be derived from *minare*, signifying *ducere*, to lead or draw, with reference to subterranean passages. In its most enlarged sense it may be described as comprising all the substances which now form, or which once formed, part of the solid body of the earth, both external and internal, and which are now destitute of and incapable of supporting animal or vegetable life. Bainbridge *Mines and Minerals*, pp. 1, 3 ; Anderson's *Law Dictionary*, *in loc.*

Sec. 2. Petroleum.

An inflammable oily liquid mixture of numerous hydro-carbons, chiefly of the paraffin series that exudes from the earth, and is extensively used for heat and light ; called also coal oil, earth oil, natural oil, Seneca oil, rock oil. *Standard Dictionary*, *in loc.*

It is from this last term that the word petroleum is derived : *petra*, a rock, and *oleum*, oil. Says Prof. Peckham, in the *Encyclopædia Britannica* : "The word petroleum (rock oil ; Germ., *erdöl*, *steinöl*) is used to designate the forms of bitumen that are of an

oily consistence. It passes by insensible gradations into the volatile and ethereal naphthas on the one hand and the semi-fluid malthas or mineral tars on the other."

The term is applied to many liquids found naturally in many parts of the earth, and formed by the gradual decomposition of vegetable matter beneath the surface. These liquids vary in color from a faint yellow to a brownish-black and in consistence from a thin, transparent oil to a fluid as thick as treacle. They are met with in most countries of Europe, but occur in abundance in Pennsylvania and other parts of the United States, in Canada, at Baku, on the Caspian Sea, and elsewhere. A light petroleum is used all over the world for illuminating purposes, and a heavy oil for lubricating machinery. The former should have a specific gravity of .810 to .820 and should not evolve inflammable vapor until heated to fifty-five degrees. If an oil gives off inflammable vapor below this temperature, it is considered unsafe for domestic use. Paraffin oil is the commercial name for an oil obtained by direct distillation from American petroleum. *Encyclopædic Dictionary, in loc.*

Sec. 3. The Same.

Petroleum or rock oil is essentially composed of hydrogen and carbon, and is a liquid, inflammable substance or bitumen exuding from the earth, and is collected in various parts of the world—on the surface of the water, in wells and fountains, or oozing from cavities in rocks. *Kier vs. Peterson*, 41 Pa., 361 (1862).

In the decomposition of vegetable substances, there are formed besides carburetted hydrogen, exhal-

ations of which are of frequent occurrence in rock salt formations, liquid and solid hydro-carbons, such as naphtha and petroleum, mineral oil or mineral tar. *Ibid.*

Petroleum being a mineral substance obtained from the earth by a process of mining, the land from which it is obtained may be called mining land and as such, lessees are authorized in express terms by the Pennsylvania Act of April 27, 1855, to mortgage their terms. *Gill vs. Weston*, 110 Pa., 313 (1885). To same effect *Thompson vs. Noble*, 3 Pitts. L. J., 201 (1870).

Sec. 4. This Definition to be Taken *sub modo*.

But though petroleum is technically a mineral, a reservation of "all timber suitable for sawing, also all minerals," will not include petroleum, the evident intention of the parties and the *ordinary* meaning of the word mineral overcoming the technical meaning. *Dunham vs. Kirkpatrick*, 101 Pa., 36 (1882).

Per GORDON, J. :

"It is true that petroleum is a mineral; no discussion is needed to prove this fact. But salt and other waters, impregnated or combined with mineral substances, are minerals; so are rocks, clay and sand; anything dug from mines or quarries; in fine, all inorganic substances are classed under the general name of minerals: Bou. L. Dic.; Wor. Dic.; Dana's Geology; Gray's Botany. But, if the reservation embraces all these things, it is as extensive as the grant, and, therefore, void. If, then, anything at all is to be retained, we must, by some means, limit the meaning of the word minerals."

He then quotes the language of Mr. Chief Justice GIBSON, in *Schuylkill Navigation Co. vs. Moore*, 2 Wheaton, 477, as follows :

"The best construction is that which is made by viewing the subject as the mass of mankind would view it; for it may safely be assumed that such was the aspect in which the parties themselves viewed it."

And concludes :

"Certainly in popular estimation petroleum is not regarded as a mineral substance any more than is animal or vegetable oil, and it can, indeed, only be so classified in the most general or scientific sense. How, then, did the parties to the contract under consideration, think and write? As scientists, or as business men using the language and governed by the ideas of every-day life?"

To the same effect were the remarks of FIELD, J., in the *Eureka Case*, 4 Sawy. (U. S.), 311 :

"These acts were not drawn by geologists or for geologists; they were not framed in the interest of science, and consequently with scientific accuracy in the use of terms. They were framed for the protection of miners in the claims which they had located and developed, and should receive such construction as will carry out this purpose."

Followed in *Cheesman vs. Shreeve*, 40 Fed. R., 787 (1889).

As to intent of the parties, *contemporanea expositio est optima et fortissima in lege*. *Connery vs. Brooke*, 73 Pa., 80 (1873).

Sec. 5.

Mr. Justice WILLIAMS, in *Wettengel vs. Gormley*, 160 Pa., 567 (1894), gives an interesting description, pertinent to the facts in that case, of the early stages of the production of petroleum.

"It is well understood among oil operators that the fluid is found deposited in a porous sand rock, at a distance ranging from

five hundred to three thousand feet below the surface. This rock is saturated throughout its extent with oil, and when the hard *stratum* overlying it is pierced by the drill, the oil and gas find vent, and are forced, by the pressure to which they are subject, into and through the well to the surface. After this pressure is relieved by the outflow, the wells become less active. The movement of the oil in the sand rock grows sluggish, and it becomes necessary to pump the wells both to quicken the movement of oil from the surrounding rock, and to lift it from the chamber at the bottom of the well to the surface. An oil or gas well may thus draw its product from an indefinite distance, and in time exhaust a large space. Exact knowledge on this subject is not at present attainable, but the vagrant character of the mineral, and the porous sand rock in which it is found and through which it moves, fully justify the general conclusion we have stated above, and have led to its general adoption by practical operators. For this reason, an oil lease partakes of the character of a lease for general tillage, rather than that of a lease for mining and quarrying the solid minerals."

Sec. 6. Natural Gas.

Inflammable gas is formed in great abundance within the earth in connection with carbonaceous deposits, such as coal and petroleum; and similar accumulations not unfrequently occur in connection with deposits of rock salt. The gases from any of these sources, escaping by means of fissures or seams to the open air, may be collected and burned in suitable arrangements, and are commonly called "natural gas." Though gas is a mineral, it is subject to the decisions governing ordinary minerals with many qualifications, and is controlled by rules analogous to those governing water percolating beneath the surface. Water, oil and, still more strongly, gas may be classed by themselves, and have not been inaptly

termed minerals *feræ naturæ*. Am. & Eng. Cyc. Law, Vol. 16, pp. 220-221, and cases cited.

In *Kier vs. Peterson*, 41 Pa., 361 (1861), it was spoken of by Mr. Justice READ, as follows :

“ In Marietta, in the State of Ohio, the inflammable gas is a constant attendant upon brine springs, so that its appearance while boring in search of rock salt is looked upon as an indication of a favorable result ; and in China the inflammable gas has been used to boil the brine and also to heat and light the buildings in which the salt is prepared. On the shores of the Caspian Sea there is a tract called the Field of Fire, which continually emits inflammable gas, while springs of naphtha and petroleum occur in the same vicinity.”

Sec. 7. The Same.

Natural gas is not heat ; nor can a company, incorporated under a statute providing for the creation of companies for supplying heat, furnish natural gas. *Emerson vs. Comwth.*, 108 Pa., 126 (1885).

The Supreme Court of Indiana has said, however, that, less common than wood or oil, it is nevertheless a fuel. *Cit. Gas & Min. Co. vs. Elwood*, 114 Ind., 126.

As to whether it is included in the words “ other valuable volatile substances ” when used in a lease in connection with the words petroleum, rock or carbon oil, the court should order the issue tried by a jury, as the words have no well-defined meaning, and are ambiguous. *Ford vs. Buchanan*, 111 Pa., 31 (1886).

Sec. 8.

It is as much an article of commerce as iron ore, coal, petroleum or any other of the like products of the earth. It is a commodity which may be trans-

ported and bought and sold in the markets of the country. And a statute forbidding the transportation of the gas from the State is void, as in conflict with the Constitution of the United States providing that the regulation of commerce shall be with the Congress. *State vs. Ind. Oil, Gas & Min. Co.*, 120 Ind., 338.

The words "oil" and "gas" are not synonymous when used in a lease; accordingly the production of gas alone will not satisfy a condition requiring the production of petroleum, rock or carbon oil. *Palmer vs. Truby*, 136 Pa., 556 (1890).*

Sec. 9.

The fullest and certainly very able discussions as to whether natural gas is or is not a mineral, are to be found in the following Canadian cases, in which certain leading cases of the courts of the United States are recognized and followed.

In *Ontario Nat. Gas Co. vs. Smart*, 19 Ont. R., 595 (1890), the question arose upon the construction of Sec. 565 of the Municipal Act, which is as follows :

"The corporation of any township or county, wherever minerals are found, may sell, or lease, by public auction or otherwise, the right to take minerals found upon or under any roads over which the township or county may have jurisdiction, if considered expedient so to do."

Said STREET, J. :

"There is absolutely nothing in this enactment which appears to control or restrict what the legislature expressed, or to explain what they meant when they gave the corporations mentioned in it the right to deal with 'minerals.'"

* Other definitions will be found in Chapter V, "Words and Phrases."

"I have not been able to discover that it should be held that the intention was to restrict the word used to any particular class or variety of minerals. * * *

"I have referred to the meaning given to the word 'mineral' in many dictionaries, and also in the current works upon mines and mining, and to the discussions in a number of cases in which the question has been considered. See *McSwinney on Mines*, pp. 11 to 17; *Bainbridge on Mines*, 4th Ed., pp. 1 to 6; *Hartwell vs. Camman*, 3 *Morrison's Mining Reports*, 229; the cases collected in *Earl of Ross vs. Wainman*, 10 *Morrison's Mining Reports*, pp. 398 to 421; *Allison and Evans Appeal*, 11 *Morrison's Mining Reports*, pp. 142 to 151; *Johnston's Appeal*, 15 *Morrison's Mining Reports*, 556; *Dunham vs. Kirkpatrick*, 101 *Penn.*, 36; *Hext vs. Gill*, L. R. 7 Ch., 699; *Lord Provost and Magistrates of Glasgow vs. Farie*, 13 *App. Cas.*, 657; *Earl of Jersey vs. Guardians, etc., of Meath Poor Law Union*, 22 Q. B. D., 555, 558; *Elwes vs. Brigg Gas Co.*, 33 Ch. D., 562.

"In most, if not all of the cases to which I have referred, the word was used in connection with a context which threw some light upon the meaning and sense in which it was to be interpreted, for it appears to be a word which is capable of a very extended meaning, when full scope may properly be given to it. For example, in the report of the Geological Survey of the State of Pennsylvania, referred to in *Dunham vs. Kirkpatrick*, 101 *Penn.*, at p. 41, the mineral products of the State are classified as follows: 'Petroleum, coal, natural gas, building stone, flag stone, building brick, fire clay, limestone, iron ore, mineral paint, and mineral water.' In that case, however, the context of the deed in which the word minerals was used was held so to control its meaning as to prevent its extending to petroleum oil.

"In *Hext vs. Gill*, L. R. 7 Ch., 699, *Mellish, L. J.*, stated at p. 712, the result of the authorities to be that a reservation of minerals includes every substance which can be got from under. neath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the court to give a more limited meaning" * * *

"It is said by Lord Macnaghten in *Lord Provost vs. Farie*, 13 *App. Cas.*, 657, above referred to, at p. 690, that it has been laid down that the word minerals when used in a legal docu-

ment, or in an Act of Parliament, must be understood in its widest signification, unless there be something in the context or in the nature of the case to control its meaning. I think myself bound by the authorities to give to the word, when used in this Act, its widest signification, and to hold that the council had power to pass the by-law in question."

In the case of *Ontario Nat. Gas Co. vs. Gosfield*, 18 Ont. App. R., 626 (1891), it was *held* that a statute declaring that "the corporation of any township or county wherever minerals are found, may sell or lease by public auction the right to take minerals found upon or under any roads over which the township or county may have jurisdiction, if considered expedient so to do," authorized the leasing of a portion of a highway for the purpose of drilling thereon a well for natural gas.

Counsel for appellants urged that

"the primary meaning (of the word mineral) would appear to be a metallic substance that may be obtained by mining operations. Air is just as much a mineral as natural gas, but this is a *reductio ad absurdum*. Volcanic smoke, water from a hot spring, etc., are minerals in one sense, but never according to ordinary usage. The legislature is to be presumed to be dealing with what was known at the time the Act was passed. New meanings and improvements cannot be read in: *Bridge Prop's vs. Hoboken Co.*, 1 Wall, 116. [HAGARTY, C. J. O., 'Suppose a new mineral is found, would there not then be power to give a right to bore?'] There would be if the new mineral were such a mineral as might reasonably be expected would have been included if known. Here the new element would never have been included. Then comes again the answer, it must first be found."

But the court unanimously arrived at the opposite conclusion, saying, per HAGARTY, C. J. O.:

"Our learned brother, in his judgment, has very fully dealt with the authorities and has come to the conclusion that natural gas falls within the meaning of minerals in the statute.

"On full consideration I have arrived at the conclusion that our learned brother could not properly have arrived at any other conclusion.

"I cannot see how we can qualify the words used by the legislature. They give the right to 'minerals.'

"Is there any inquiry properly open to us except whether this product falls within that description? Is it or is it not properly a mineral?

"If one of the definitions cited by Mr. Aylesworth (of counsel) be correct, it certainly is included in such words. 'Mineral bodies occur in the three physical conditions of solid, liquid and gas. There is reason to believe that the minerals we know as solids once existed in the liquid or gaseous state.' Encyc. Brit., Mineralogy. * * *

"The nature of 'gas' is very fully discussed in Tomlinson's Cyclopædia of Useful Arts, vol. 1, p. 736 (1866), under head of 'Gas and Gas Lighting'; and again, vol. 2, p. 186, under head 'Mineralogy,' a full account of natural gas as a well-known phenomenon as far back as 1659. He says this case is probably the light carburetted hydrogen of chemists—the fire-damp of the coal pit and marsh gas found abundantly in stagnant pools, etc. 'In the strictest sense, a mineral is a natural inorganic body, with a definite composition, and a regular determinate form or series of forms.'

"I think the appeal must be dismissed."

The cases of *Gesner vs. Cairns*, 2 Allen's (New Brunswick) Reports, 595 (1853), and *Gesner vs. Gas Co.*, James' (Nova Scotia) Reports, 72 (1853), may also be consulted with profit upon the question whether the word minerals is to be understood in the technical or the popular and ordinary sense.

CHAPTER II.

THE NATURE AND RIGHT OF PROPERTY.

The inquiry into the exact nature of the property of the holder of a mineral right, that is, as to whether it is a corporeal or incorporeal hereditament, a license, a license coupled with an interest or a right in the nature of an easement for the purpose of entry and examination, whether it is real property or personal, and if personal, possessing to what extent the nature of realty, might easily become indefinite in its scope and entirely unsatisfactory in its results, so far as the earlier cases are concerned, because of their number, their flat contradictions one of the other and the impalpable distinctions asserted by them to exist in the endeavor to reconcile those contradictions. A distinct chapter might be devoted to an examination of the subject in detail, with no other result than the inquiry, after its perusal, *cui bono?* The doctrine is now settled by the later cases and, it is believed, permanently. Certainly any disturbance of it would go far towards the unsettling of great values.

So far as concerns the history of the law, however, it is proper that a concise review should be made of the varying lights in which courts and text-writers have looked upon the same expressions in instruments for the accomplishment of the same

general object, and the radically differing conclusions to which they have been led. This review, for the purposes of a work like the present, must necessarily be concise, though it will not be hasty. Attention is directed to the opinion of the court and to the words of the grant or lease *in each case*, as in them alone can be found a full statement of the reasons leading to the judgments pronounced.

Sec. 10. Nature and Right of Property in Minerals as Such.

The majority of the cases concern rather the nature of the mineral right as between the parties to a contract looking to the development of the lands supposed to contain the mineral than the nature of the mineral itself. Much is said under the former head which is applicable to the latter. Nevertheless, a logical treatment of the subject demands first a search of the fountains before we follow the streams. To this end we commence with the common law view.

At common law all minerals, except gold and silver, which belong to the king by virtue of the royal prerogative, lying in a direct line between the surface and the centre of the earth, belong to the owner of the soil, unless there has been a severance of the title to the mine from that of the surface. 15 Am. & Eng. Cyc. Law, 506; 1 Black. Com., 294; 3 Kent's Com., 378; 2 Washb. R. P., bk. 2, ch. 1, sec. 3; Williams R. P., 14; *Sloan vs. Furnace Co.*, 29 Ohio St., 568; *Whitaker vs. Brown*, 46 Pa., 197.

And the general doctrine, as stated by Bainbridge, is that "all minerals which are unworked and unsevered" are parts of the freehold, and as such

constitute landed property or real estate. "*In this condition*, they will be subject to the general rules which govern the enjoyment of real property. When severed from the freehold they become mere personal chattels. See, also, *Lyon vs. Gormley*, 53 Pa., 261 (1866); *Lykens vs. Dock*, 62 Pa., 232 (1869).

"Coal and minerals in place are land. It is no longer to be doubted that they are subject to conveyance as such." *Caldwell vs. Fulton*, 31 Pa., 475 (1858).

Per THOMPSON, J., in *Pa. Salt Mfg. Co. vs. Neel*, 54 Pa., 66 (1866):

"The ordinary effect of a deed gives seisin of lands, *cujus est solum, ejus usque ad cælum*. It would carry all the minerals to an indefinite extent downwards under the land as well as the surface. There is therefore a deed to one party for the coal in the land by a party who owned both land and coal, and a subsequent deed generally, and without reservation to another of the land. The subject of these grants until severed formed a unit; after, they were distinct parts of separate properties, as much so as the divided portions of what was once a single tract of land."

Oil is a mineral and being a mineral is part of the realty. In this it is like coal or any other mineral product which *in situ* forms part of the land. *Stoughton's Appeal*, 88 Pa., 198 (1879).

"It (petroleum) is part of the land. It is land." Concurring opinion of WOODWARD, J., in *Kier vs. Peterson*, 41 Pa., 357 (1861).

It is a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may with propriety be called mining lands. *Gill vs. Weston*, 110 Pa., 312 (1885).

A grant of land carries the minerals in it. *Hartwell vs. Camman*, 10 N. J. Eq., 128.

Sec. II. The Nature of Mineral Rights.

The law upon the subject may be said to begin with *Lord Mountjoy's Case*, 4 Leonard, 147. As is pointed out by Mr. Chief Justice WOODWARD in *Funk vs. Haldeman*, *infra*, the reports of that case differ widely, Lord Coke's version of the decision being subjected to the criticism that in reporting cases in which he was of counsel, he was "not superior to the professional infirmity which sometimes makes 'the wish the father to the thought,'" as shown by his frequent substitution of his own arguments for those of the judges. "In his reports it is often very difficult to distinguish the points ruled by the judges from *his* inferences and observations. *Southcote's Case*, 4 Coke, 83, is an instance in point, for which Lord Holt in the great case of *Coggs vs. Bernard*, 2 Lord Raymond, 915, rebuked his habit of 'improving' upon cases and drawing unwarranted conclusions. It was probably a similar liberty he took with Mountjoy's case."

But the case as "taken for law by the courts, both English and American," seems to be that Lord Mountjoy, seized of two parts of a manor, sold and conveyed them by deed, with a proviso that it should at all time be lawful for him, his heirs and assigns to dig upon the said premises for ores necessary for the making of alum and copperas. Mountjoy then sold the mineral right to a third party, stipulating for one-half of the clear profits, the term to continue for thirty-one years.

It was *held*, after conferences at "divers times" among the justices that (1) the said two parts were well conveyed, absolutely and without conditions ; (2)

that Lord Mountjoy had a right in fee to dig the ores mentioned in the proviso ; (3) that Mountjoy might dig ore and other things for making alum and copperas as he should see fit, and (4) as to whether any remedy was given for the things reserved by the indenture, the justices were very doubtful and could not agree.

It was as to the assignability of the interest that the divergency in the reports mentioned above arose.

It will be well to remark further, at the beginning of and throughout the examination of the cases in point, the distinction alluded to by the United States Supreme Court, in *Brown vs. Spilman*, 155 U. S. R., 669-670 (1894).

Said Mr. Justice SHIRAS, speaking for the court :

“ Petroleum and gas are substances of a peculiar character, and decisions in ordinary cases of mining for coal and other minerals which have a fixed *situs*, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land, and are part of it so long as they are on it, or in it, or subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property : *Brown vs. Vandergrift*, 80 Penn. St., 142, 147 ; *Westmoreland Nat. Gas Co.'s Appeal*, 25 Weekly Notes of Cases (Penn.), 103.”

Nevertheless, there are many points in common between the minerals, petroleum and gas, and the minerals, coal and iron, and, notwithstanding the “fugitive and wandering existence” of the former, the utterances of the courts will be found in many cases as applicable to one class as the other.

Sec. 12. A Review of the Leading Cases.

CORPOREAL HEREDITAMENT.

The first case to be cited is that of *Caldwell vs. Fulton*, 31 Pa., 475 (1858), where it is *held* that the right to minerals beneath the surface is distinct from the right to the surface; that they are a corporeal hereditament and pass by apt words in a deed.

And in *Caldwell vs. Copeland*, 37 Pa., 431 (1860), it is said: "So entirely is a mineral right, after severance, a claim to *land*, and, therefore, not an incorporeal hereditament, that title to it cannot be acquired by prescription. Prescription lies only for incorporeal rights, not land."

In *Chicago, etc., O. & M. Co. vs. U. S. Petroleum Co.*, 57 Pa., 83 (1868), an agreement to lease land for a term of years, *with* the exclusive right to bore for and collect oil, was *held* to pass a corporeal interest.

In *Stoughton's Appeal*, 88 Pa., 198 (1878), it was *held* that, though a guardian may ordinarily lease any of his ward's property of such a character as makes it the subject of a lease, yet he cannot lease oil land belonging to his ward for the purpose of its development, because oil is a mineral, and being a mineral is part of the realty, and such a lease would be in effect a grant of part of the *corpus* of the estate of the ward.*

*In *Chamberlin vs. Dow*, 16 W. N. C., Pa., 532 (1884), the lower court narrowed the scope of the decision in *Stoughton's appeal* to the question of the guardian's right to lease the realty of his ward without leave of court, stating that the character of the rights which would have been vested in the grantee, had the conveyance been a valid one, did not arise and that therefore the case was not authority on that point. The Supreme Court, while affirming the judgment, makes no reference to the point in its very brief opinion.

To the same effect is *South Penn Oil Co. vs. McIntyre*, W. Va. 28 S. E. R., 922 (1898), where it was *held* that oil and gas being part of the realty in and under which they exist, the committee of an insane person having an interest therein, can only sell or lease such interest by decree of court as provided by statute. Citing *Wilson vs. Youst*, W. Va. 28 S. E. R., 781 (1898).

In *Bates vs. Dunham*, 58 Iowa, 308, it was said:

“Guardians have authority to lease the lands, loan the money and manage the interests of their wards, under the direction of the court, but the direction must precede the act, and without such direction the guardian would have no authority to do such acts and would be answerable therefor.”

In *Barker vs. Dale*, U. S. Cir. Ct. W. Dist. Pa., 3 Pitts. L. J., 190 (1870), the lease was for the sole and only purpose of mining and excavating for petroleum, coal, rock or carbon oil, unto the lessee and his heirs, etc., for twenty-five years in consideration of one-half the oil found. *Held*, per McKENNAN, *Cir. J.*, that by the lease a corporeal interest in the business therein described was vested in the plaintiff, which was the proper subject of ejectment.*

It may be remarked here that the only point involved in many of the earlier cases was as to the proper form of action to be brought in each—ejectment for land, trover for oil, etc., and to this cause may be assigned a considerable portion of the confusion which exists among them. Since the Pennsylvania

* While *Barker vs. Dale* is quoted upon the point mentioned, its other rulings as to forfeiture, time being of the essence of the contract, etc., are not the law in Pennsylvania at the present time, numerous decisions of the Supreme Court of the State, which will be noted under the proper title, favoring another and more just rule.

Practice Act of 1887, reducing the number of the forms of action and simplifying the procedure, this source of difficulty has to a large extent been removed in that State.

INCORPOREAL.

In *Johnstown Iron Co. vs. Cambria Iron Co.*, 32 Pa., 241 (1858), the grant of a privilege of raising iron ore on the lands of the grantor was *held* to be an incorporeal hereditament. "It was not a sale of all the iron ore in the land for a round sum as in the case of *Caldwell vs. Fulton*. * * * It was a right exercisable within the lands of another and, therefore, falling strictly within the definition of an incorporeal hereditament. It was not a sale of all the ore, notwithstanding the stipulation that the privilege was to be given to none else, because it was to be paid for by the ton, and, of course, no more was sold than should be raised." Note the element of exclusiveness.

In *Clement & Masser vs. Youngman & Walter*, 40 Pa., 341 (1862), A had granted B "the exclusive right and privilege of searching for, digging," etc., all the iron ore and limestone on certain land, with right of ingress and egress, room for building houses and iron works, B agreeing to pay A at the rate of twenty cents per ton of clean ore. STRONG, J., referring to *Caldwell vs. Fulton*, *supra*, says: "We see no reason to abandon the opinion we then entertained." But his conclusion on the facts was as follows:

"Looking, then, to all the parts of the agreement, those already noticed as well as the fact that the subject-matter thereof was, in many particulars, undefined and undefinable until iron-works should be erected, *we are unwilling to say that it vested in Hughes a corporeal hereditament*, such as is essential to the maintenance of an action of ejectment."

Funk vs. Haldeman, 53 Pa., 229 (1867), is probably the most frequently quoted case upon the subject. Upon a grant to F, his heirs and assigns, of the free and uninterrupted privilege to go upon a certain tract of land for prospecting, boring and taking any ore, oil, etc., out of the earth, the grantor to receive one-third of all that should be taken out, and reserving the right of tillage, it was *held* that F took an incorporeal hereditament in fee.

The court said that the case was clearly distinguishable from *Caldwell vs. Fulton*, and stated that it resembled *Johnstown Iron Co. vs. Cambria Iron Co.* much more clearly. "As to all not raised, there was no change of property; as to all raised, one-third was retained and only two-thirds were sold. *And that as a chattel.*"

Per WOODWARD, C. J.:

"If Funk acquired no estate in lands or minerals, what is his right to be denominated? I answer, a license to work the land for minerals. Bainbridge, in his work on the law of mines and minerals, p. 246, says: 'There is a great distinction between a lease of mines and a license to work mines. The former is a distinct conveyance of an actual interest or estate in lands, while the latter is only a mere incorporeal right to be exercised in the lands of others. It is a profit *a prendre* and may be held apart from the possession of land.' "

The court further *held* that while there was no express stipulation that F's mining right should be exclusive of the grantor's, it was a fair and necessary inference from the premises.

"But, though we hold the papers in this instance to constitute a license and not a lease, it is *a license coupled with an interest*; not a mere permission conferred, revocable at the pleasure of the licensor, but a *grant* of an incorporeal hereditament, which is an

estate in the grantee, and may be assigned to a third party. Even a parol license, without consideration, on the faith of which the grantee expends money, cannot be revoked at the pleasure of the grantor, but will be enforced in equity."

In one of the latter paragraphs of "this too long opinion," as the learned judge pronounces it, although it was stated that \$9,000,000 depended on the decision, he says:

"Throughout this opinion I have treated oil as a mineral. Until our scientific knowledge on the subject is increased, this is the light in which the courts will be likely to regard this valuable production of the earth. But out of this results the difficulty of a strict classification of a right to take it as an incorporeal hereditament. If a mineral, it is part of the land; and a right to take land or any part of land is not, strictly speaking, an incorporeal hereditament. Nor is the right to fire bote, or plow bote or turves; and yet, for want of a better classification, this is treated in law as an incorporeal interest. To the same head is to be referred these oil rights."

In *Union Petroleum Co. vs. Bliven Petroleum Co.*, 72 Pa., 173 (1872), the agreement was to lease "the exclusive right and privilege of boring for oil, etc., upon the farm, upon which the first party now resides with the right of access to and from such places as may be selected by the party of the second part"; the consideration was \$150 and one-third of the product. *Held*, to vest only an incorporeal hereditament.

LICENSE.

In *Dark vs. Johnston*, 55 Pa., 164 (1867), next to *Funk vs. Haldeman*, perhaps, the most familiar among the earlier decisions, by an agreement which the court pronounced "singularly obscure," the owner of certain land believed to contain oil agreed with one Baird to grant him an exclusive right to sink wells in consi-

deration of "\$100 for each and every period of ten years (\$10 per year) for each and every well or pit that said Baird may *continuously* pump oil from"; if oil were found, the right to pump to continue as the rent should be paid. *Held*, that the agreement was not a conveyance of a corporeal estate but a mere license, personal to the grantee and determinable upon assignment by him, though, when followed by development and large expenditures by him on the faith of it, and no abandonment being asserted, it could not be taken away by re-entry or another conveyance.

Mr. Justice STRONG, in discussing the nature of the subject-matter of the contract, spoke as follows :

" Oil is a fluid, like water, and is not the subject of property, except while in actual occupancy. A grant of water has long been considered not to be a grant of anything for which an ejectment will lie. It is not a grant of the soil upon which the water rests: Co. Lit., 4, V. It would confound all legal notions, were it held that an action be maintained for the recovery specifically of a subterranean spring or stream of water, no matter whether the waters are mineral or not. There is a manifest difference between a grant of all the coal or ore within a tract of land, or even the grant of an exclusive right to dig, take and carry away all the coal in the tract, (which we held in *Caldwell vs. Fulton*, 31 Pa., 475, to be a grant of a corporeal interest,) and a grant of waters in or on the tract. *The nature of the subject has much to do with the rights that are given over it*, and to us it appears that the right to take all the oil that may be found in a tract of land, cannot be a corporeal right."

See, also, *Rynd vs. Rynd Farm Oil Co.*, 63 Pa., 397 (1867).

Upon the substance of the controversy, the rights of the parties, Judge STRONG used language, the spirit of which controls the decisions of the courts a quarter of a century later in their desire to brush aside distinctions possessing nothing more than

technical merit and to render judgment from the standpoint of the parties at the time that they made their contract and from the object which they had in view :

“ Call this what we may, an easement, which is an incorporeal right, or a temporary right to possession, defeasible, and ended when it shall be ascertained that the land does not contain oil, it was not for Mr. McGuire, the lessor, to take it away. Neither his conveyance of the land, nor a re-entry by himself, could deprive Baird of the license and *the action under it.*”

Grove vs. Hodges, p. 504 of the same volume, affords an example of both the corporeal and incorporeal tenures, the question arising upon the construction of two instruments, the first bearing date December 1, 1863, and granting *all the iron ores* upon and under a certain tract, *with* the full and exclusive right of mining, etc. *Held*, following *Caldwell vs. Fulton*, to be a conveyance of a corporeal hereditament, passing in fee simple the entire ownership of the ore in the land.

Another bore date June 16, 1855, and granted, in consideration of twenty-five cents per ton and \$30 for each acre of land destroyed by the mining operations, *the right to mine, take and carry away* the iron ore on certain land. *Held*, that this was not the grant of a corporeal interest, but only of a right.

And further, upon this question of license and its nature, *Thompson's Appeal*, 101 Pa., 225 (1882), may be cited. The articles between the parties *granted and sold* a certain tract of land “for the purpose of prospecting, boring, digging, etc., and otherwise obtaining oil, salt and other minerals thereon.” *Held*, that by it there was nothing vested in the grantees or lessees but the right to work the land ; they acquired

no estate either in land or minerals. Said Mr. Justice GORDON :

“ If they found oil, they were to have three-fourths of that which they brought to the surface, but, as to any property to the oil *in situ*, they had none. *Funk vs. Haldeman*, 3 P. F. S., 229. In this incorporeal right to prospect for and take the oil found in the land the parties may have had a fee, if such a term applies at all to a mere license, which I very much doubt, the case cited to the contrary notwithstanding. *But if a fee, it was sub conditione and base in its character.* But this right, by whatever name designated, was but accessory to the main design, the getting of oil to the surface, for until that was done, the parties had no interest in any tangible thing.”

In *Kitchen vs. Smith*, p. 452, of the same volume, the lessee under an oil lease had exclusive possession of the land for the purpose of searching for, producing, storing and transporting oil. He had the right to possession of so much of the land as was necessary, and was in the actual possession of a considerable part, if not the whole. This, said Mr. Justice TRUNKEY, foreshadowing his decision in *Duke vs. Hague*, presently to be mentioned, was not a mere license, and the lessee was adjudged to have the right to recover from the lessor taxes paid by him under compulsion.

The following cases are also in point :

Harlan vs. Lehigh Coal Co., 35 Pa., 287 (1860) ; *Brown vs. Corey*, 43 Pa., 495 (1862) ; *Whitaker vs. Brown*, 46 Pa., 197 (1863) ; *Armstrong vs. Caldwell*, 53 Pa., 284 (1866) ; *Penna. Salt Co. vs. Neel*, 54 Pa., 9 (1867) ; *Gill vs. Weston*, 110 Pa., 312 (1885) ; *Marshall vs. Mellon*, 179 Pa., 371 (1897).

Sec. 13.

After this review of what may be called the earlier cases, we commence an examination of the more recent decisions, which cannot but be pronounced the more

satisfactory from every standpoint, as in them the courts have seemed to regard the substance rather than the letter of the contract, and have adhered, at times, against strong pressure, to a uniform construction.

The first of these is *Duke vs. Hague*, 107 Pa., 66 (1884), where the nature of the right of the lessee in a lease granting the exclusive right for the purpose of mining for petroleum, reserving a portion of the oil for rent or royalty was discussed ; failure of the lessee to perform the covenants to avoid the lease. *Held*, following *C. & A. Oil Co. vs. U. S. Pet. Co.*, 57 Pa., 83, that the lessee is vested with an interest in the land and is entitled to notice of partition by owners of the fee.

Said Mr. Justice TRUNKEY :

“ The lessee is vested with an interest in the land. * * * His interest is that of a tenant for years for the purpose of mining ; he has an absolute right of possession of all the surface necessary, and no one else can rightfully take out oil during the term, save under him. The whole of the oil or only a part may be taken under the lease, but whatever shall be taken out is of the substance of the realty. He is not an absolute owner of the whole of the oil, as he would be were all the oil in place conveyed to him in fee.”

The question arose in another form in *Kile vs. Giebner*, 114 Pa., 381 (1886). It was not an oil case, but the principle involved was subsequently held to be applicable to the general subject of the nature of the interest of a lessee in an oil lease. Kile, as sheriff, had by virtue of a writ of *fi. fa.* levied on the interest of defendant in certain saw-mill property which had been leased to him. He brought action against the sheriff for the alleged trespass, but the court *held* that it was entirely competent for that officer

to sell the execution debtor's interest on a *fi. fa.* as personal and not real property, and that the fixtures erected by the tenant for the purpose of carrying on the business, though permanently attached to the land, should be treated as personal property.

In *Brown vs. Beecher*, 120 Pa., 590 (1888), a demise of land for a term of years, "with the sole and exclusive right and privilege, during said period, of digging and boring for oil and other minerals," etc., was *held* to convey an interest in the land—a chattel real, but none the less, a chattel.

Titusville Novelty Iron Works Appeal, 77 Pa., 103 (1874), is cited by the court, and the following extract from the opinion in that case will be pertinent :

"There is, however, a wide difference between chattels personal and chattels real. The latter grow out of and are attached to the realty, and hence by reason of their fixed and permanent character, can only be seized and held as realty. A lease of land during the term is as fixed as the land itself, for it can only be used upon the land out of which it arises. It is nothing more or less than a right to use the freehold for the term mentioned in the lease. It is, therefore, an estate in land."

And a levy upon the execution debtor's interest with its wells, engines, engine-houses, etc., was *held* to be good, even though not made in view of the premises. *Sanderson vs. Scranton*, 105 Pa., 469 (1884), was also cited.

In *Westmoreland Nat. Gas Co. vs. De Witt*, 130 Pa., 235 (1889), the lessee's right in the surface of the land was *held* to be *in the nature of an easement of entry and examination*, with a right of possession arising where the particular place of operation is selected and the easement of ingress, egress, storage, transportation, etc., during the continuance of operations.

In *Duffield vs. Hue*, 129 Pa., 94 (1889), a *grant* of the "exclusive right and privilege of digging and boring for oil and other minerals," for the term of fifteen years was adjudged a lease for the production of oil and not a sale of the oil of the land.

Barnhart vs. Lockwood, 152 Pa., 82 (1892): The lease is not a grant of property in the oil, but merely a grant of possession for the purpose of searching for and procuring oil.

Glasgow vs. Chartiers Oil Co., Id., p. 48: The legal effect of the agreement is to confer on the grantee the right to explore for oil on the tract described. Further, under the special provisions of the lease in that case, if the grantee exercises the right and finds nothing, he is under no obligation to continue his explorations. If he explores and finds oil or gas, the relation of landlord and tenant or vendor and vendee is established, and the tenant would be under an implied obligation to operate for the common good of both parties, and pay the rent or royalty reserved.

To the same effect, *Venture Oil Co. vs. Fretts, Id.*, p. 451; *McNish vs. Stone, Id.*, p. 457. In the last-named case, the following conclusion of law by the lower court was approved:

"If the search is successful, then the tenant becomes a tenant for the purpose of operating the land at the rent agreed, and his right of possession exists not for the purpose of search, but for the purpose of operating the oil or minerals which his search has discovered. Whether the tenancy exists depends, therefore, upon whether the oil, which is its object, is found to exist upon the land."

Wettengel vs. Gormley, 160 Pa., 559 (1894): The lease conferred upon the tenant an exclusive right to take the oil that might underlie the tract. It was in

its legal effect a sale of the oil, for the removal of which the surface and the sub-surface were subjected to the necessary servitudes. But from the peculiar nature of the mineral, its vagrant character, and the porous sand rock in which it is found, an oil lease partakes of the character of a lease for general tillage, rather than that of a lease for mining or quarrying the solid minerals.

Sec. 14.

In New York, the legislature took the matter in hand, and the following statute was enacted. (N. Y. Laws, 1883, ch. 372.)

"All oil wells and all fixtures connected therewith, situate on lands leased for oil purposes and oil interests, and rights held under and by virtue of any lease or contract or other right to license or operate for or produce petroleum oil, shall be deemed personal property for all purposes except taxation, but nothing herein contained shall affect the laws now in force relating to taxation."

(It will be noticed that the statute does not mention natural gas wells. Presumably, therefore, the law is unchanged as to the nature of property therein.)

But in *Broman vs. Young*, 35 Hun., 173 (1885), it was *held* that the common law, so far as the relation of the mortgagee to the leasehold interest is concerned, remains unchanged.

In *Bank vs. Dow*, 41 Hun., 13 (1886), the owner conveyed land, excepting and reserving all the oil, gas and other minerals, with the exclusive right to dig, mine, etc., with the rights of way, water, etc. It was *held* that the interest reserved was an interest in real estate, a chattel real, subject to the lien of a judgment

to sale under execution, and that the act above mentioned had no reference to such an estate.

Sec. 15. The Doctrine in Ohio.

An oil lease in the usual form confers an estate in the nature of an incorporeal hereditament ; strictly speaking, it is not a right in the land as such, but a right to enter upon the land, to sink wells and take from underneath the soil such oil as the lessee may find ; to take it from the land and to render a portion to the land owner, the remainder to become the property of the lessee to dispose of as he sees fit. *Ohio Oil Co. vs. Toledo, etc., R. R. Co.*, 4 Ohio C. C. R., 215 (1890).

Per HAYNES, C. J., orally:

"The right (of the lessee) * * * has been defined only under this class of leases, because it is to be borne in mind that there is the class of leases set up here, and there is another class of leases, as in the mining of coal, that really confer a right in the soil or the mineral under the soil, which convey, in fact, the soil or the mineral itself ; but they are of a very different form from this class of leases. Now these leases, it is true, let and grant to the alleged lessee, premises, but they grant them for a specific purpose. * * * In general terms, there is reserved to the grantor a right to carry on his farm for agricultural purposes ; but we take it that the true construction of leases (oil and gas) is, that the alleged lessee is to be confined in general terms to those rights, which are granted to him within the lease, and that the rest are practically reserved to the owner of the premises."

It was *held* further that a railroad obtaining a right of way from the owner need not condemn the lessee's right, for that would admit an interest in the land. Nevertheless, the lessee is entitled to protection.

The case of *Herrington vs. Wood*, 6 Ohio C. C. R., 326 (1892), introduces another name for the lessee's interest. It holds that what are denominated gas or oil leases, containing a clause conveying premises for a term of years, and so long as gas or oil is produced in paying quantities are licenses coupled with a conditional grant. It is to be regretted that the learned court did not see fit to cite authorities for this definition, as it is certainly a novel one.

Sec. 16. Lessee's Interest Subject in Ohio to Lien of Neither Judgment, Execution nor Real Estate Mortgage.

In *Meridian Nat. Bank vs. McConica*, 8 Ohio C. C. R., 442 (1894), it was *held* that a judgment rendered against the licensee (lessee) in a county where an oil well is located, said well being operated by the licensee under what is denominated an oil lease, creates no lien in favor of the judgment creditor.

An execution, issued upon a judgment against a licensee, cannot be levied upon an oil well, operated by said licensee, so as thereby to create a lien.

A real estate mortgage duly recorded does not create a lien in favor of the mortgagee upon the interest of the licensee. And the point was left undecided as to whether such oil leases are the subject of a chattel mortgage.

It was further *held* that the only remedy of a creditor wishing to reach the interest of a licensee in such oil lease is by action under Section 5464, Revised Statutes of Ohio, which reads as follows :

“ When a judgment debtor has not personal or real property subject to levy on execution, sufficient to satisfy the judgment, any

equitable interest which he has in real estate, as mortgagor, mortgagee or otherwise, or any interest he has * * * in money, contract, claim or chose in action * * * shall be subject to the payment of the judgment *by action*."

The above conclusions were arrived at by the court, after consideration of Section 5375 of the Revised Statutes, creating a lien upon "lands and tenements" within the county where judgment is rendered, from the first day of the term at which judgment is rendered, and upon "all other lands as well as goods and chattels of the debtor," from the time they are seized in execution.

Said SENEY, J.:

"They (judgment and execution creditors) have no lien by virtue of their levy upon the oil wells and products thereof, *because they are held under a contract and are not lands and tenements*, and the contractual rights under the contract are not goods and chattels, hence, could not be seized in execution. As to the derricks and other chattel property connected with the oil wells, a lien could be created by seizure upon execution, provided the derricks, etc., were the property of the firm or of a member of the firm."

Sec. 17. The Doctrine in Indiana.

The case of *Knight vs. Indiana, etc., Co.*, 47 Ind., 105 (1874), might seem at first glance opposed to the Pennsylvania and other authorities considered by the court. In that case A and B executed an instrument by which the right was granted to B to enter upon the lands of A to prospect for coal and other minerals, and, if found in sufficient quantities to satisfy B, he to have the privilege of mining and removing the same, paying a certain price per ton to A. B reserved the right to abandon the agreement at his pleasure. *Held*, that the instrument created only an estate at will.

The court recognized the Pennsylvania authorities, and said :

“Had the instrument in question stopped with the words in the second section, ‘bargain, sell, etc., unto the party of the second part, etc., all the mineral coal, limestone, fire-clay and oil upon and under the farm,’ there would be no doubt but that an estate of inheritance would have been created, but when we come to the closing part of the fourth section, it is found that the grant is ‘only during the continuance of this agreement.’” The court then mentions the use of the words “agreement or lease,” “rent” and “abandonment,” distinguishes *Funk vs. Haldeman*, and rules, as stated above, that the instrument is a lease and creates an estate at will.

But, following the spirit of *Dark vs. Johnston*, *supra*, the same court ruled in *Snowden vs. Vials*, 19 Ind., 10 (1862), that a mere license, revocable at the pleasure of the party giving it, may become irrevocable when coupled with an interest, or when it has been acted upon by the party to whom it has been granted.

Sec. 18. The Same—Married Women.

A lease of land for oil or gas purposes is beyond the power of a married woman to make without the joinder of her husband therein under statutes which give her no power to encumber or convey her real estate without such joinder, and therefore she cannot recover any rent upon it. *Columbian Oil Co. vs. Blake*, 13 Ind. App., 680.

Sec. 19. Real or Personal.

As to whether a leasehold interest in oil and gas property is distinctively real or personal, with the incidents attaching to one or the other class, there can be but little doubt, though, as we have seen, the latest

cases pronounce it an interest in land, and the lease itself the equivalent of a sale of a portion of the land. To quote again *Brown vs. Beecher*, it is a *chattel real, but none the less a chattel*. As such, it must be governed by the law pertaining to chattels.

Upon the death of the lessee, the lease becomes the property of his administrator. *Keating vs. Condon*, 68 Pa., 75 (1871).

A mining contract with stipulations to pay a certain annual sum until mining be commenced, is not realty, as would be an absolute sale of the minerals, but a chattel, capable of sale as such by lessee's administrator. *Horn vs. Bowen*, 2 Clev. (Ohio), 133.

Petroleum oil is a mineral, and while it is in the earth, forms part of the realty, and when it reaches a well, and is produced on the surface, it becomes personal property and belongs to the owner of the well. *Kelly vs. Ohio Oil Co.*, Ohio, 49 N. E. R., 399 (1897).

It may be levied upon and sold on a *fi. fa.* as personal and not real property. *Kile vs. Giebner*, 114 Pa., 381 (1886); citing *Dalzell vs. Lynch*, 4 W. & S., 256; *Sower vs. Vie*, 2 Harris, 99; *Williams vs. Downing*, 6 Harris, 60.

In Pennsylvania, a statute was necessary to validate the mortgage of a leasehold interest. Had it been realty, no legislation would have been demanded.*

Under the New York statute of 1883, ch. 372 :

"All oil wells and all fixtures connected therewith, situate on lands leased for oil purposes, and oil interests and rights held under and by virtue of any lease, or contract, or other right or license to operate for or produce petroleum oil, shall be deemed personal property for all purposes except taxation."

* Further examination of this statute, April 27, 1855, will be made in a subsequent chapter.

Whether this was declaratory of or a change in the law as it stood before, we do not find ; but, notwithstanding the statute, it was *held* in *Bank vs. Dow*, 41 Hun., 13, that the exception and reservation of all the oil, gas and other minerals, etc., is an interest in real estate—a chattel real.

Sec. 20. The Respective Rights of the Life-Tenant and the Remaindermen in a Producing Lease; and Incidentally of Waste.

One of the most evenly balanced questions in this entire subject of the law, and one not to be decided in a moment, is, To whom should the yield during a life-estate in an oil or gas well go—to the holder of the life-estate, claiming the right to all that he can make the territory produce by his activity and enterprise ; or should the yield be impounded and only the interest upon it be paid him, while the *corpus* is preserved for the remainderman ? An answer to this question requires as well careful consideration as the examination of the earlier and later authorities.

Sec. 21. The Rule at Common Law.

A tenant for life or years has the right to work quarries or mines already opened, but not to open new ones, unless such right is expressly granted by the owner of the reversion. And the same rule applies to a mortgagee in possession.

Tenants for life are prohibited from destroying those things which are not included in the temporary profits of the land. 1 Cruise on Real Property ; *Givens vs. McCalmont*, 4 Watts, 485 ; *Jackson vs. Brownson*, 7 Johns., 207 ; 4 Kent's Com., 74.

Waste is a destruction in houses, shade trees or other corporeal hereditaments to the disinherison of him that hath the remainder in reversion. Co. Litt., 53.

See, also, Bainbridge M. & M., Ch. 3, Sec. 2 ; *Astry vs. Ballard*, 2 Lev., 185 ; *Whitfield vs. Bewit*, 2 P. Wms., 240 ; *Stoughton vs. Lee*, 1 Taunt., 402 ; *Coates vs. Cheever*, 1 Cowen, 481 ; *Lynn's Appeal*, 31 Pa., 44 ; S. C., 72 Am. Dec., 721 ; *Griffin vs. Fellows*, 81 Pa., 114.

Sec. 22. The Same.

U. S. vs. Bostwick, 94 U. S. R., 65 (1876) :

"In every lease there is, unless excluded by the operation of some express agreement or covenant, an implied obligation on the part of the lessee to so use the property as not unnecessarily to injure it, or, as it is stated by Mr. Comyn, 'to treat the premises demised in such manner that no injury be done to the inheritance, but that the estate may revert to the lessor undeteriorated by the wilful or negligent conduct of the lessee.' Com. L. & T., 188. This implied obligation is part of the contract itself, as much so as if incorporated into it by express language. It results from the relation of landlord and tenant between the parties which the contract creates." *Holford vs. Dunnett*, 7 M. & W., 352.

Sec. 23. The Earlier Pennsylvania Cases.

In *Kier vs. Peterson*, 41 Pa., 361 (1861), the court said, speaking of coal :

"If mines are already opened, or if the lease permits their being opened, it is not waste for the tenant to work them *even to exhaustion*. Nor would it be waste to open new shafts or pits to follow the same vein. So as to salt works ; if there is an existing salt well and works, *it would not be waste to dig a new salt well in connection with it.*" Citing *Findlay vs. Smith*, 6 Munf. (Va.), 134 ; S. C., 8 Am. Dec., 733 (1818).

To the same effect: *Neel vs. Neel*, 19 Pa., 323 (1852); *Irwin vs. Covode*, 24 Pa., 162 (1854); *Westmoreland Coal Co.'s Appeal*, 85 Pa., 344 (1877); Cf. *Rankin's Appeal*, 1 Mon. (Pa.), 308 (1888); *Sayers vs. Hopkinson*, 110 Pa., 473 (1885).

Sec. 24. Timber.

In *Williard vs. Williard*, 56 Pa., 119 (1867), the life-tenant took off the timber, and the court refused to decree a forfeiture for waste. If the use is wanton or in excess of the just measure of the tenant's right, the remedy of the remainderman is by estrepement. The court expressed a doubt as to whether forfeiture for waste exists in Pennsylvania.

Sec. 25. The Later Cases.

Eley's Appeal, 103 Pa., 303 (1883), arose upon the construction of a will devising a portion of an estate to the children of B at his death, the *interest or income* arising from the same to be paid to B during his life. The executors, under authority of the will, made a perpetual lease of all the coal in certain of testator's lands at a certain rental. It was *held* that the rents accruing from the lease were "income," and as such should be paid absolutely to B.

The opinion was delivered by Mr. Justice STERRETT, who later, as Chief Justice, delivered that in *Blakley vs. Marshall*, *infra*. To a proper understanding of the distinction, the following extract is necessary :

"The question is whether the money accruing from the lease is to be considered 'income' in the sense in which that word was employed by the testator, or *capital* to be invested and only the interest paid to appellants respectively."

And the entire opinion, too long for insertion here, should be attentively read.

M' Clintock vs. Dana, 106 Pa., 386 (1884), follows *Eley's Appeal* in terms, but goes a step farther. A testatrix devised her residuary estate to her executor to apply so much of the "yearly proceeds or income" thereof as should be necessary for the support of her daughter, and the investment of the balance during her minority. Upon the majority of the daughter, the entire income of the estate was to be paid her during her life, and after her death, the *corpus* of the estate was limited to her children. The executors had the power both to lease and sell real estate, and in pursuance thereof, "leased" certain coal land, *unopened when testatrix died, to lessees who were empowered to mine the coal until it was exhausted*, paying therefor a certain royalty or rent.

Held, that the rent or royalty thus received was payable to the daughter as "income" of the estate within the meaning of the will.

Per CLARK, J.:

"She (the testatrix) certainly never intended that her daughter should receive *merely the interest upon the installments* representing the actual annual profit or yield of the mines; if she was to participate upon mere profits or yield, she was entitled to these wholly; if in the sole value of the coal, then she was entitled to the interest only."

Mr. Chief Justice MERCUR dissented, on the grounds that the mine was not opened and the judgment recognized a right to sell under a power to lease.

In *Wentz' Appeal*, in the same volume, p. 301, the rents and royalties arising from the lease by the executors of coal lands of the decedent were held to

be income and as such, payable to the widow, the life-tenant. And in *Shoemaker's Appeal*, p. 392 of the same volume, a similar ruling was made. Followed in *Raynolds vs. Hanna*, 55 Fed. R., 783 (1893). See, also, *Bradford's Appeal*, 17 Atl. R., 538.

In *Woodburn's Estate*, 138 Pa., 606 (1891), it was held that when a testator, who has made a lease of his land for oil purposes, stipulating as part of the consideration therefor, for a definite part of the oil produced, *bequeaths the income of his estate* to life-tenants, such part of the oil produced *after* his death is *income*, to which the life-tenants are entitled absolutely.

Said the court :

"The oil in the pipe-lines to the credit of the testator, at the time of his death, was sold by his executors for \$697.57. No question arises as to this money. It was clearly a part of the *corpus* of the estate. The oil run into the pipe-lines since testator's death was sold by the executors for \$2463.77. We are of the opinion that *this* was part of the income of the estate. It was so held by the auditor and the court below, and we think correctly."

Sec. 26. Mortgagor and Mortgagee.

A mortgagor left in possession of the mortgaged premises (coal and iron lands) is entitled to the rents, issues and profits of them without rendering an account to the mortgagee, who can never recover them from him. The mortgagor is regarded in equity as the real owner, the court regarding the mortgage as a mere security and the mortgagee, though the legal title be in him, as having a chattel interest. *Childs vs. Hurd*, 32 W. Va., 66 (1889); citing *Gilman vs. Telegraph Co.*, 91 U. S. R., 603; *Teal vs. Walker*, 111 U. S. R., 248; *Beverley vs. Brooke*,

4 Gratt. (Va.), 208; *Noyes vs. Rich*, 52 Me., 115; *Wilder vs. Houghton*, 1 Pick., 87.

Sec. 27.

In *Blakley vs. Marshall*, 174 Pa., 425 (1896), certain of the lessors in an oil and gas lease being life-tenants of the property, with remainder in fee to their children, it was *held* that the life-tenants were entitled only to the *interest on the royalties* during life, and at their death, the *corpus* of the fund, made up of the *aggregate of the royalties*, should go to the remaindermen.

Mr. Chief Justice STERRETT, delivering the opinion, treated the oil in place as a mineral, and therefore part of the realty, following *Stoughton's Appeal*, 88 Pa., 201 :

"In support of the plaintiffs' claim to the whole of the royalty," he said, "much stress was laid on the doctrine of waste; but we fail to see that it has any application whatever to the facts of this case. It is conceded that the oil was produced under the lease made by plaintiffs in their own right as life-tenants, and as trustees for those in remainder; and, as appears by the opinion of the court, their action as trustees for the remaindermen was with its sanction and approval. It is difficult to see on what principle the *cestui que trust* should be excluded from participation in the royalty that accrued during the existence of the life-estate. Assuming, for the sake of illustration, that they had been of full age and *sui juris*, and, instead of being parties through their trustees to an oil lease, they and the tenants for life had united in a conveyance in fee of part of the land: Could it in the absence of any agreement on the subject, be successfully claimed that the life-tenants were entitled to the purchase money? We think not. There is no difference in principle between the cases."

"If there be life-tenants and remaindermen, the former are entitled to the enjoyment of the fund (*i. e.*, interest thereon) during life, and at the death of the survivor the *corpus* of the fund

should go to the remaindermen. This is as nearly a just and equitable distribution as can be made."

"It was obviously necessary, as well to the interest of both the tenants for life and the remaindermen, that they should thus unite in the lease, because no practical oil operator would undertake the development of supposed oil territory on the faith of a lease from life-tenants only, and for the further and more important reason that, if not promptly developed and worked, the land would soon have been drained of its oil through wells on adjoining lands."

Sec. 28.

This ruling was affirmed, if possible more distinctly, but from another standpoint, in *Marshall vs. Mellon*, 179 Pa., 371 (1897), the court holding that where no oil or gas operations have been commenced on land before an estate for life has accrued, the tenant for life has no right to operate for oil or gas for himself, and cannot give such right to any person by lease.

The plaintiff upon the death of her husband, became vested with a life-estate in oil property *which had never been operated*; she executed a lease of the same, and upon refusal of lessee to operate or pay rent, she brought suit. *Held*, that there was no cause of action.

Said Mr. Justice GREEN, after citing *Stoughton's Appeal* and kindred cases :

"We see no difference between the present case and those cited, so far as this question is concerned. The plaintiff was but a tenant for life of the premises in question. There had never been any oil or gas operations commenced on the land before her estate for life accrued. *She had no right, therefore, to operate for oil or gas herself, and she could not give such a right to any lessee from her.*"

The court does not seem altogether satisfied that cases may not arise out of the doctrine in *Marshall vs. Mellon*, presenting equities demanding recognition, for the concluding paragraph of the opinion is as follows :

"It seems to us, however, in view of the peculiar character of oil and gas as being fugacious in their nature, and liable to be diverted by operations upon other adjoining or nearby lands, in order to preserve the interests of both life-tenants and remaindermen, it would be well for the legislature to make such enactments as would enable the owners of this class of lands to secure to themselves the benefits of such minerals as these. *As it is now, the law is not efficacious to that end.*"

And one of the questions which the legislature may as well settle, when it sets about the task, is : May not a remainderman, acquainted with the fugacious nature of oil and gas, and seeing the holders of adjacent property "tapping" his territory, compel the life-tenant to develop upon equitable terms? Or must he stand by, awaiting the expiration of the life-estate and find, when he comes into possession, complete exhaustion where there was once abundance?

Wilson vs. Youst, (W. Va.), 28 S. E. Rep., 781 (1897), follows *Stoughton's Appeal* and *Blakley vs. Marshall*, *supra*. Compare, however, *Koen vs. Bartlett*, 41 W. Va., 556 (1895).

Sec. 29. Severance.

In mineral lands the surface or soil, as adapted to cultivation, may be separated from the mineral right or the right to dig under the surface for ore, and one person may own one of these rights and another person the other. *R. R. Co. vs. Sanderson*, 109 Pa., 583 (1885); S. C., 58 Am. Rep., 743. Cf. *Swint vs. McCalmont Oil Co.*, 184 Pa., 202; S. C., 38 Atl. R., 1020 (1898).

Sec. 30. The Same—How Created and Its Effects.

A severance of the surface from the underlying *strata* may be created either by reservation or express grant ; after severance a mineral right is an independent interest in land ; it forms a distinct possession, is held upon a distinct title and is as much the subject of sale, devise or inheritance, as the surface land. *Caldwell vs. Copeland*, 37 Pa., 427 (1861).

Sec. 31. Severance—Requisites of Adverse Possession—Statute of Limitations—Notice in Fact.

If there is no severance of the mineral from the surface, an entry upon the surface will extend downward and draw to it a title to the underlying minerals, so that he who disseizes another and acquires title by the statute of limitations, will succeed to the estate of him upon whose possession he has entered ; *but*, if a severance is made before his entry, and he has notice of that severance, either by the record or *by the state of the possession acquired* both by observation and by years of service in the employment of the owner, his entry upon either of the estates will not affect the other. *D. & H. Canal Co. vs. Hughes*, 183 Pa., 66 (1897).

Per WILLIAMS, J. :

“ The owner of a mineral estate may enter upon and operate it while the owner of the surface is leaving his estate unoccupied and wild, but the possession of the lower estate will not reach upward and attach to the surface. Each estate may be occupied, conveyed, incumbered, sold by the sheriff or allotted in partition, without any effect upon the other. If a trespasser enters either estate and maintains possession, he can acquire title by the statute of limitations after twenty-one years to so much as he has actually

held for that length of time ; but his title will not extend above or below the estate on which he enters. If he would acquire any part of the mineral, he must make his entry upon, and maintain his position within the limits of the mineral estate for the requisite period of time in an open, notorious, exclusive and continuous manner. *Caldwell vs. Copeland*, 37 Pa., 427 ; *Armstrong vs. Caldwell*, 53 Pa., 284 ; *Kingsley vs. Hillside Coal & Iron Co.*, 144 Pa., 613. *A covert or clandestine entry will not do.* Such an entry will confer no right on the wrongdoer until his entry is, or by the exercise of due diligence, might be discovered by the owner. Until then, the owner cannot know that his possession has been invaded. Until he has or ought to have such knowledge, he is not called upon to act, for he does not know that action in the premises is necessary and the law does not require absurd or impossible things of any one. *Lewey vs. Fricke Coal Co.*, 166 Pa., 536 ; *Scranton Gas & Water Co. vs. Lackawanna Coal & Iron Co.*, 167 Pa., 136. Possession to be adverse must be open as well as notorious. *The intruder must keep his flag flying in a visible and hostile manner.* *Plummer vs. Hillside Coal & Iron Company*, 160 Pa., 483. So far on in our inquiry we have a well beaten path to travel, but from this point forward we are without any definite landmark to guide us. The real question presented is, May there be a severance of the mineral estate from the surface by the acts of the owners of the original freehold ? And, if so, may there be notice in fact of such severance to other persons that will affect them in the same manner as the constructive notice arising from the recording of a deed ? ”

Both of these points are answered in the affirmative, the opinion concluding :

“ It would be inequitable and unjust to hold otherwise in this case. He (the defendant) had stolen in upon the surface while at work for the company that owned both it and the coal. He knew of the *severance in fact* of these estates, and aided in the general work that made the severance evident to the world. If, entering under such circumstances, he could acquire the surface, he is limited to it. Knowing all the facts, he was bound, if he desired to acquire title to his employer's mine or any part of it, to enter upon the *mineral estate* at some point, take possession, hold it openly and adversely for twenty-one years, so that his

position and claim could have been known to the owner. Any different holding would lead to very absurd results. It would require us to hold that constructive notice is better than actual notice. Even this is short of a full statement of the result of the contrary doctrine, for in reality it would require us to hold that *notice in fact* had no significance and bound no one."

Sec. 32. After Severance the Different Interests are Taxable Separately.

Where the surface of lands and the minerals in place thereunder have been severed by the agreement or conveyance of the owner and the respective interests have become vested in different owners, the municipal authorities are bound to levy their taxes according to the ownership and value of these divisions. And each owner can be made responsible only for the tax on his interest, whether underlying *strata* or surface. *Sanderson vs. Scranton*, 105 Pa., 469 (1884). See, also, *Logan vs. Washington County*, 29 Pa., 373 (1857).

Sec. 33. Taxation—Continued.

Where coal, oil or other mineral underlying a tract of land is conveyed by deed or lease, the grantee takes an estate in land assessable and taxable to him; but where the instrument is but a lease for a definite term, with the probability or possibility of its reversion to the grantor, the estate is not assessable as land to the grantee. *Moore's Appeal*, 4 Pa. Dist. R., 703 (1894), C. P. McKean Co.

And the fact that lessee has covenanted to pay the taxes has no bearing upon the question of the primary liability of the lessor. *Ibid.*; distinguishing *R. R. Co. vs. Scranton*, 109 Pa., 583 (1885).

Sec. 34.

When a severance takes place and the holder of a *stratum* of coal or other mineral records his title or enters into possession of his sub-surface estate, he is not affected by the state of the title to or possession of the surface. *Moreland vs. Frick Coke Co.*, 170 Pa., 33 (1895). Citing *Plumer vs. Iron Co.*, 160 Pa., 483 (1894); *Algonquin Coal Co. vs. C. & I. Co.*, 162 Pa., 114 (1894).

The facts in this case and the conclusions of law therefrom should be noted. A and B, brothers, inherited land from their father, of which they made parol partition. A died, leaving B as his heir-at-law. B's son, John, claimed title to A's land by parol gift and adverse possession. B conveyed the coal to C, whose title defendants, by sundry conveyances, obtained. The testimony showed that John was present when the conveyance was made by B to C, and that he did not object, but, on the contrary, shared in the proceeds, and saw the coal mined until his death, a period of seventeen years, without protesting against it. In a suit by his heirs against defendant for damages for mining and carrying away the coal, it was *held*, (1) that the evidence of John's adverse *possession of the surface* in no way contradicted the evidence of his acquiescence in the sale of the coal; (2) that it was not evidence of his adverse and hostile possession of the coal; (3) that his acquiescence in the sale of the coal estopped him and his heirs from denying the sale.

Sec. 35. Distinctness of Property Rights in Oil and Gas.

Each of the minerals should be separately covenanted for. Gas is not an incident of oil, and a lease

which mentions oil alone will not carry with it the right to the gas, if, as a result of the explorations, gas, but not oil, be found. *Truby vs. Palmer*, 4 Cent. R., 925; followed in *Palmer vs. Truby*, 136 Pa., 556 (1890). For a fuller discussion of the subject, see Chapter III, title, "Natural Gas."

Sec. 36. Presumption that Lessee Holds Under Landlord's Title.

Ordinarily the production to a vendee of a lease to one who has possession of the land determines how he holds it; inquiry of him by the vendee for secret frauds or equities is not necessary; the presumption is that he holds under the landlord's title and according to the lease.

The rule forbidding a lessee to dispute his lessor's title does not apply where one having no title, by trick or artifice induces another in possession to take a lease. *Evans vs. Bidwell*, 76 Pa., 497 (1874). See, also, *Kountz vs. Kirkpatrick*, 72 Pa., 385 (1872).

Sec. 37. Right of Lessee Who Has Purchased Judgment Liens Upon the Leasehold to Sell Subject to His Estate.

A lessee under an oil lease who has bought judgments which were liens upon the leased premises prior to the execution of the lease, has a right to issue execution on the judgments and sell the property subject to his leasehold estate.

In such a case the lessee has an equity to have the estate of the judgment debtor sold in the inverse order of the conveyances made by him, and the court has authority, under the Pennsylvania Act of April 22, 1856, Pamphlet Laws, 532, to make an order

enforcing this equity. *Porter vs. Vanderlin*, 158 Pa., 146 (1893).

Sec. 38. The Pennsylvania Act for the Quieting of Titles to Land by Rule Upon the Claimant to Appear and Frame an Issue Does Not Apply in Cases Where the Mineral Product Has Been Severed and Become Personalty.

The act of June 10, 1893, entitled "An act to provide for the quieting of titles to land," provides that "when any person * * * shall be in the possession of any *lands or tenements* in this commonwealth, claiming to hold possession of or own the same by any right or title whatsoever," and the right or title shall be disputed or denied, a rule may issue against the parties so disputing or denying to appear and show cause why an issue be not framed to determine their respective rights.

In the case of the *Canal Co. vs. Genet*, 169 Pa., 343 (1895), it was *held* that where the claim was not to the land or its possession, but only to a part of the product, *e. g.*, coal after it has been severed and become personalty, or to the duty to account and pay royalties, the act does not apply.

Mr. Justice MITCHELL, after freely conceding that "coal *in situ* is land, and that a lease of the entire body of coal in a tract with unlimited right of mining has been treated in our decisions as a sale of the coal as land," says :

"There was no claim to the land or to its possession, but to a part of the product after it had been severed and become personalty. It was as if a lessee farming on shares had ruled his lessor to come into court and try a question of the division of the gathered crops. The answer of the appellee set up no right which could have been asserted in ejectment, or which was in the class of

adverse claims the statute was intended to cover ; nothing which could not have been asserted in a personal action for the severed coal or for its value, if it had been wrongfully sold by the appellant. The case was not within the statute."

Sec. 39. Property in Oil in Pipe-Lines or Tanks—Bailments—Embezzlement.

B was the owner of several hundred barrels of oil in the pipes or tanks of the Union Pipe Line, for which he had two accepted orders on said company. He delivered these orders to the firm of H & B, oil dealers, and took from them a receipt, the terms of which were that the oil was to be held for storage at five cents a barrel per month. At the time of the delivery of the accepted orders to H & B, the oil was in the tanks or pipes of the pipe-line and undistinguishable from other oil therein. H & B deposited the orders to the credit of their general account with the pipe-line, and thereafter deposited and drew until they became embarrassed and, to meet their engagements, continued to draw on their balances on the books of the company until they failed. B demanded the oil, and H & B were unable to deliver. *Heid*, that they were guilty of larceny as bailees.

The delivery of the accepted orders was a delivery of the oil and constituted a bailment, and the defendants having converted the oil to their own use, the conversion was fraudulent, and they were guilty of larceny. *Hutchinson & Batchelder vs. Comwth*, 82 Pa., 472 (1877).

The opinion was delivered by Mr. Justice PAXSON. Careful consideration was given to the authorities upon the question of the right of property. For

them reference must be made to the report, but the following extract will be read with interest :

“ In the consideration of the questions involved in this case, we cannot close our eyes to the total revolution in the manner of doing business, which has been brought about by the discovery of petroleum in this state. It has developed a new industry of vast importance. Methods for conducting it have been devised and put in operation, which were wholly unknown when the cases I have cited were decided. Instead of oil being hauled a long distance from the well to a market or shipping station, and there stored in barrels or in tanks in a merchant's ware-rooms, it is now turned at once by the producer into the pipes of the Pipe-Line Company, and thence conducted to the line of the railroad or canal for shipment, or may be held in said pipes, or the tanks connected therewith. Each producer knows that his oil is mixed with the oil of other producers. Each barrel of oil in the pipes is the precise counterpart of every other barrel contained therein. It differs neither in quantity, quality nor price. The oil is sold and passes from hand to hand upon the accepted orders or certificates of the Pipe-Line Company. * * * Thousands of barrels of oil are sold and delivered daily in the market upon similar orders. No one doubts that the property passes ; that the orders draw to them the constructive possession, and that the delivery of said orders is a symbolical delivery of the oil. * * * How can these defendants allege with reason that as to them there was no delivery, when, in point of fact, they drew the oil out of the pipes and applied it to the payment of their debts ? If it had not been drawn out, it would have been in the pipes still to meet the demand of the prosecutor. Even if delivery of the orders was not a complete delivery of the oil at time, such delivery became complete when the defendants drew it out, or enabled others to draw it out by a transfer of the orders. It would render the law contemptible in the eyes of business men, were it to say that there was no delivery of this oil when, as a matter of fact, there was a delivery for all the purposes of trade and commerce ; such a delivery as enabled the defendants to sell it and apply the proceeds to the payment of their debts.”

And further :

“ If there was a delivery of the oil, of which we have no

doubt, it follows necessarily that there was a bailment. This brings us to the further question whether the defendants fraudulently converted it to their own use. This point is free from difficulty. It is a fraud *per se* for a bailee to convert to his own use the property committed to his care. The conversion is, *prima facie*, evidence of the fraud. Larceny at common law involves something more. It requires the *animus furandi*. There must be a felonious taking. Not so with larceny as bailee. It requires merely a fraudulent conversion. * * * In the case of a bailment, therefore, so far as the intent to defraud may be regarded as of the essence of the crime, it must be presumed from the unlawful conversion. If I deposit my pocketbook for safekeeping over night with my landlord, and he opens it and converts the contents to his own use, he is a thief both in law and in morals. Nor does it matter that he parted with it to pay his debt under stress of an execution, with the intention of restoring it to me ultimately.

* * * But it is said that the defendants were bankers in oil, and that the case resembled that of the ordinary banker who receives money upon deposit. It is difficult to see the analogy. By the law and the usage of banking, the depositor who makes a general deposit of his money becomes a mere creditor of the banker. The money deposited becomes the property of the banker. He has a right to use it in his legitimate business. He may loan it out to his customers upon such security and upon such terms as are usual with bankers. No such state of facts exists here. *The defendants acquired no property in nor right to use the prosecutor's oil.* * * * They had no right to lay their hands upon the property of the prosecutor, confided to them for safekeeping in order to relieve themselves."

Sec. 40. Property in Oil Delivered to a Pipe-Line Company.

Oil delivered to a pipe-line company belongs, *prima facie*, to the person delivering it, and denial of ownership, on the ground that it is claimed by another, puts upon the company the burden of showing that claimant has a better title. *Enterprise Oil & Gas Co. vs. Nat. Transit Co.*, 172 Pa., 421 (1896).

Sec. 41. Oil in a Tank—Pledge—Transfer of Possession.

Oil in a tank is effectually pledged by written order to the owner's agent in charge of the oil to hold it to the order of the pledgees as collateral security for a certain sum of money, when such order is accepted by the agent, as this transfers the possession of the oil to the pledgees. *Bank vs. Harkness*, W. Va., 32 L. R. A., 408 (1896).

Said Judge ENGLISH:

"In the case we are considering there was an acceptance of the order by Fewsmith (the owner's agent) in accordance with the terms of the order, and JONES ON PLEDGES (Sec. 37), says: 'A delivery of a document of title which serves to put the pledgee in possession is equivalent to an actual delivery of them.' In Section 229 the same author says: 'The delivery of a bill of lading is a symbolical delivery of the property represented by it. The person who takes a bill of lading for a valuable consideration, whether this arises at the time or rests upon a previously existing debt, has the right to the property without taking actual possession of it, or doing any further act to perfect this title.' See, *Neill vs. Rogers Bros. Produce Co.*, 40 W. Va., — . So it is said: 'Warehouse receipts, by custom, have long been considered as representing the property mentioned in them; and the assignment or indorsement of such instruments has long been regarded as equivalent to the delivery of such property.' See JONES, Pledges, Sec. 280. As we regard this transaction, the possession of Fewsmith before said written order was drawn on him and accepted was the possession of Harkness (the owner); by such acceptance he agreed to become the agent of said trustees in holding the possession of the oil and controlling the same, and did so become; and, in this manner, the possession was transferred from Harkness to said trustees, Harkness holding the possession by his agent *facit per alium facit per se*, transferred to Fewsmith as the agent of these trustees, and they held it, as did Harkness, through their agent. 'Though a pledge be evidenced by a writing, it need not be recorded if the writing constitute a pledge and not a mortgage.' JONES, Pledges, Sec. 6." Citing *Jewett vs. Warren*, 12 Mass., 300; S. C., 7 Am. Dec., 74; *Neuan vs. Roup*, 8 Iowa, 207; *Whitney vs. Tibbits*, 17 Wis., 359.

CHAPTER III.

NATURAL GAS.

Sec. 42.

What has been said by way of preface to the nature and right of property in petroleum, applies in large part also to natural gas. Nevertheless, it has its distinctive features in law, which it will be well to notice separately.

Sec. 43. Nature and Right of Property.

“Water and oil, and, still more strongly, gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *feræ naturæ*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their ‘fugitive and wandering existence within the limits of a particular tract is uncertain,’ as said by Chief Justice AGNEW in *Brown vs. Vandergrift*, 80 Pa., 147, 148. They belong to the owner of the land, and are part of it, so long as they are on it and are subject to his control; but when they escape and go into other land or come under another’s control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. *If an adjoining, or even a distant owner, drills his own land and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his.*” MITCHELL, J., in *Westmoreland, etc., Gas Co. vs. DeWitt*, 130 Pa., 249; *People’s Gas Co. vs. Tyner*, 131 Ind., 277 (1891); 16 L. R. A., 443.

The fact that gas from a well is not kept flowing into the pipe-line of the lessee, but is shut in the well

as reserve for use in emergencies, does not affect the possession of it by the lessee when he is in control thereof by means of a connection between the well and his pipe-line, so arranged that he can have the gas flow into his line at any time. *Westmoreland, etc., Gas Co. vs. De Witt, supra.*

Per MITCHELL, J., :

"The fact that they did not keep it flowing, but held it generally in reserve, did not affect their possession any more than a mill-owner affects the continuance of his water-right when he shuts his sluice-gates."

Whether natural gas is a "volatile substance" under a lease for mining "oil and other valuable volatile substance;" held to be a question of fact and not of law. *Ford vs. Buchanan*, 111 Pa., 31 (1886).

"The common law is the living science of justice, and adapts the application of fixed principle to changes in the affairs of men. Natural gas is a newly discovered and as yet unfamiliar product of nature, and the law will recognize a general progress in its economical, prudent and profitable use." *Saltsburg Gas Co. vs. Saltsburg*, 138 Pa., 250 (1890).

Sec. 44. The Same.

A case in which this subject was examined as fully as in any thus far reported was that of *Wood Co. Pet. Co. vs. W. Va. Transportation Co.*, 28 W. Va., 210; S. C., 57 Am. Rep., 659. A landlord had leased premises for the express and sole purpose of mining and taking carbon oil therefrom at a fixed royalty. The tenant opened a well which produced both oil and hydro-carbon gas, the latter in large quantities issuing by its own force from the well. The tenant separated the gas from the oil, and by pipes conducted it beyond

the leased premises, where he sold or appropriated it to his own use. *Held*, that the tenant was not accountable to the landlord for the gas or its value.

This might seem to some a strained view of the law—that lessee was adjudged to have a right to that which he had not paid for and which was clearly not within the contemplation of the parties when the lease was executed. The following extracts from the opinion of the court, per SNYDER, J., will therefore be pertinent :

“While the grant is for the specific purpose of mining for and removing carbon oil and for none other, still there is necessarily included in this grant, all the incidents essentially or naturally pertaining to its enjoyment. Included in these are the elements, such as light, air and water. And having the legal right to enter upon and occupy any portion of the premises, the appellant could, without becoming a trespasser or incurring any liability to the lessors, use and appropriate anything it might find thereon, which is not the property of another, such as animals *feræ naturæ*, or waters percolating through the land, even though by such use and appropriation it may deprive another, having an equal right, of the power to do so. These are not the subjects of absolute property, and being therefore *jure naturæ* capable of qualified ownership only, they belong to him who first appropriates them. 2 Kent’s Com., 347 ; 2 Wash. R. P., 327 (72) ; *Acton vs. Blundell*, 12 M. & W., 324.

“If the hydro-carbon or natural gas now in controversy belongs to the class of things which are incapable of being absolute property, but are the subject of qualified property only, such as those above mentioned, then it is clear this gas was not the property of the plaintiff, and the appellant was not liable for its use and appropriation ; but if, on the other hand, said gas is susceptible of absolute ownership, then it is a part of the realty of the plaintiff, to which the appellant has no right under said lease, and is, therefore, liable to the plaintiff for the value of the same. The important and decisive inquiry in this cause is, therefore : To which category does hydro-carbon gas belong ?

"In the article on 'Gas and Gas Lighting' in the Encyclopedia Britannica, it is stated that inflammable gas is formed in great abundance within the earth in connection with carbonaceous deposits, such as coal and petroleum; and similar accumulations not unfrequently occur in connection with deposits of rock salt; the gases from any of these sources, escaping by means of fissures or seams to the open air, may be collected and burned in suitable arrangements. Thus the 'eternal fires' of Baku, on the shores of the Caspian Sea, which have been known as burning from remote ages, are due to gaseous hydro-carbons issuing from and through petroleum deposits. In the province of Szechuen in China, gas is obtained from beds of rock salt at a depth of 1500 or 1600 feet; being brought to the surface, it is conveyed in bamboo tubes and used for lighting as well as for evaporating brine; and it is asserted that the Chinese used this naturally evolved gas as an illuminant long before gas lighting was introduced among European nations. * * *

"It is apparent from this history of the nature and properties of natural gas that it partakes more nearly of the character of the elements, air and water, than it does of those things which are the subject of absolute property. * * * The right of appropriation is so absolute in the case of water flowing under ground that if the owner of land in digging a well or cellar or working a mine on his own premises cuts off the water, which by percolation supplies his neighbor's well and thereby diverts it into his own or drains the well of his neighbor, the latter is without remedy; it is *damnum absque injuria*, if not negligently or maliciously done. *Brown vs. Illins*, 25 Conn., 594; S. C., 27 *Id.*, 94; *Emporia vs. Soden*, 25 Kan., 608. * * *

"If this were an open spring producing oil and gas or such a natural emission of gas as that at Bloomfield in New York, or that at the Burning Spring in Wirt County, W. Va., instead of a well 1000 feet deep, there could be no more question, it seems to me, as to the right of the lessee to appropriate the gas under the provisions of this lease than there is of his right to consume the air and water upon the premises. What difference, then, is there between these cases and the well in question, which was opened in express conformity with the written terms of the lease? It is the same as if the well had been there before the lease was made. *Kier vs. Peterson*, 41 Pa., 357."

It may not be considered hypercritical to suggest that a conclusion, contrary to the foregoing, might be gathered from the language of the court in the first paragraph above quoted. *Was* natural gas *in marketable quantities* a mere "incident essentially or naturally pertaining to the enjoyment of this lease" for oil and nothing else? If the gas was to be used for the purpose of fuel or of light in developing the oil production, the question may be answered unhesitatingly in the affirmative, and adjudged cases referred to elsewhere sustain this view. When, however, another distinct article of commerce "in large quantities" and of great value was discovered, which neither party to the contract of lease had anticipated, is it equitable to hold that it was only an "incident" and its appropriation *damnum absque injuria*?

This opinion was delivered in 1886, and the learned court said:

"Neither the developments of science nor the evidence in this cause establish that such gas is likely to be exhausted by its use or consumption. That such may ultimately be the case is possible, but the fact, if it is such, is not sufficiently certain or apparent to be the basis of a judicial decision."

But we know to-day, as matter of fact, of which the courts will take judicial notice (*Famieson vs. Gas Co.*, 128 Ind., 555), that the contrary is the case, and that gas wells are often and speedily exhausted in the use. And it is suggested that, as far as concerns the question of a distinct right of property in natural gas, the familiar rule governing instruments of this nature, that everything which is not expressly granted is reserved, should apply, and the mineral gas should not pass without especial mention any more than would the minerals coal or iron.

Said Mr. Justice TRUNKEY, in delivering the opinion of the court in *Kitchen vs. Smith*, 101 Pa., 457 (1882):

"Speaking for myself, I exclude the inference that I agree that the lessees 'in an oil lease' have the absolute right of property in the gas. I think the dissenting (concurring) opinion by WOODWARD, J., *Kier vs. Peterson*, *supra*, is sustained by his reasoning and the authorities therein cited. Gas often escapes in large quantities from oil wells, and is of great value for fuel. It is conducted to towns and extensively used in mills and dwelling-houses. Its value may greatly exceed the value of the oil produced. That a tenant who has only the right to take oil, or salt, may conduct away the gas and appropriate it to his own use, seems to me an arbitrary conclusion."

This view is strengthened, and, so far as the Pennsylvania courts are concerned, established by the ruling of the Supreme Court of that State in *Truby vs. Palmer*, 4 Cent. R., 925, approved in *Palmer vs. Truby*, 136 Pa., 556 (1890). The court said in the case first cited:

"It (the lease) expressly declares the property shall be occupied and worked for petroleum, rock or carbon oil, and shall not be occupied or used for any other purpose whatever; and if no oil is found in paying quantities within four years from this date (the date of the lease), this lease shall be null and void. Oil was not found. *It would be a clear perversion of language to hold that oil and gas are synonymous terms.* The evidence is insufficient to prove that the word gas was omitted from the lease through fraud, accident or mistake. The doctrine of equitable estoppel is not applicable to the facts proved."

In the case last mentioned, the lessees of land demised to them for the production of oil alone, who obtained gas but not oil, and were thereupon dispossessed by ejectment brought upon a forfeiture alleged,

were denied the equity of reimbursement for the expenses of their operations out of the proceeds of the gas obtained, the court holding that they had none. Said Mr. Chief Justice PAXSON :

“The rights of the parties are determined by their contract, which is a law of their own making. It is a speculative contract, wholly at the risk of the lessees. If they obtain oil they make a profit, in some instances a very large one ; while if they fail, the loss is wholly their own. They have no right to be reimbursed by the lessors, *or out of their property*, under any circumstances whatever. As before observed, it was a speculation pure and simple, in which the lessees assumed all the risk. They did so for the chance of getting seven-eighths of the oil. Upon what principle of equity can this risk be shifted upon the lessors, and they be required to pay for the expenditures *which the lessees agreed to make at their own risk* ? It will be seen at a glance that there is no analogy between such case and that of a person who is in possession of land, under color of title, and innocently builds a house or barn, or makes other valuable and permanent improvements upon it. In such case, in an action for the mesne profits, he may justly be allowed for the value of such improvements to the extent they have increased the value of the property. But here, the lessees did nothing but what they agreed to do at their own risk.”

Sec. 45.

A right to take natural gas from the land of another is not “land held in fee” under the acts of June 16, 1836, Section 72, authorizing the sale of property of a public corporation not essential to the purposes of the corporation, and the act of April 7, 1870, providing for the sale or execution of all the property of such a corporation except lands held in fee. *Greensburg Fuel Co. vs. Irwin Nat. Gas Co.* 162 Pa., 78 (1894).

Sec. 46. An Article of Commerce.

Natural gas is as much an article of commerce as iron ore, coal, petroleum or any of the like products of the earth. The gas in the earth may not be a commercial commodity, but when brought to the surface and placed in pipes for transportation, must assume that character as completely as coal in the cars, or petroleum in the tanks. *State vs. Indiana & Ohio Oil, Gas & Min. Co.*, 120 Ind., 575; S. C., 6 L. R. A., 579 (1889); S. C., 2 Interstate Com. R., 758.

"We suppose it clear that Pennsylvania could not prohibit the transportation of coal or petroleum to another State, and there is no difference in principle between cases where coal is the commodity affected, and those in which it is natural gas. It is no doubt true that there is a point at which a natural or manufactured product is not an article of commerce; but when it assumes such a form as fits it for transportation from State to State, it is, so far as the law of interstate commerce is concerned, transformed into a commercial commodity. For the purposes of taxation, an article of property may not be regarded as a commercial commodity until it has started on its way from one State to another; but property that may become an article of commerce cannot be kept in the State where it was produced, by a State law forbidding its transportation. *Coe vs. Errol*, 116 U. S., 517 (29 L. Ed., 715).

"If this were not so, then not only might coal or petroleum be kept within the State in which it was produced, but so might corn and wheat, cotton and fruit, and lead and iron. If such laws could be enacted and enforced, a complete annihilation of interstate commerce might result; and it was to prevent the possibility of such a result that the provision vesting exclusive power in the federal government was written in the national constitution. *State vs. Woodruff S. & P. Coach Co.*, 114 Ind., 155; 13 West. Rep., 311."

But, in *Famieson vs. Indiana Nat. Gas, &c.*, Co., 128 Ind., 555 (1891), it was *held* that natural gas cannot be made the subject of general commerce

between the States, because of its local and intrinsic qualities, and it cannot, so far as local safety is concerned, be made the subject of uniform federal legislation, but is a legitimate subject for reasonable police regulation.

An attempt is made to distinguish it from the case in 120 Indiana, just cited, but, as is shown by the dissenting opinion of OLDS, J., the rulings are clearly in conflict, and not susceptible of distinction on this point.

Sec. 47. How Far Judicial Notice Will be Taken of the Nature of Natural Gas.

In *Gas Co. vs. Jones*, 14 Ind. App., 55 (1895), counsel for land owner, in a condemnation proceeding, had obtained an instruction to the following effect :

“In cases of this kind it is presumed that the company will put in and maintain a pipe-line in a reasonably prudent and careful manner, but natural gas is a highly inflammable substance and liable to explode ; so in this case, in considering the damages to be assessed, you may take into consideration the probability of injuries from fire or explosions, which may result from the ordinary, prudent and careful operation of the pipe-line. *Held*, erroneous.

Per REINHARD, J.

“It is true that courts take judicial knowledge of the fact that natural gas is a highly inflammable and explosive substance. *Jamieson vs. Gas & Ore Co.*, 128 Ind., 555 (12 L. R. A., 652) ; *Mining Co. vs. Patton*, 129 Ind., 472. Hence, the first part of the first instruction, as above set forth, is correct, at least as an abstract proposition of law. But that there is any probability from fire or explosions, etc., we must decline to affirm. On the other hand, it must be presumed, we think, until the contrary is made to appear by proper evidence, that natural gas may be safely confined and transported in receptacles and pipes for an indefinite

distance. We grant that courts must take cognizance of things that must happen according to the laws of nature, and that, therefore, they will take notice of the fact that when natural gas comes in contact with air and fire it will ignite, and that explosions may follow. Gas pipes may also explode from the mere pressure exerted by the gas. But that it is impossible or even improbable that iron pipes can be manufactured which will not explode or leak when natural gas is conducted through them, is quite another proposition, and one of which courts will not take notice in the absence of proof."

Sec. 48. Gas May be Permitted to Escape Even Though it Depletes a Neighbor's Supply.

In the absence of malice or negligence in draining a well, a land owner may permit gas to escape from it and go to waste, if no other injury is done to his neighbor than that which would result from the depletion of the gas basin in which his own and his neighbor's lands are situated. *Hague vs. Wheeler*, 157 Pa., 324 (1893).

Sec. 49. Pipe-Line Company Allowing Oil to Percolate through Land of Another Liable in Damages.

Where an owner of land prosecutes a business which has no necessary relation to the land itself, and is not essential to its development, he is liable for consequential injuries done to the property of another. *Hauck vs. Pipe Line Co.*, 153 Pa., 366 (1893).

Where a pipe-line company carries oil from a distance, allows it to escape from the pipes and to percolate through another's land and destroy his springs, the company is liable in damages for the

injury. The case was pronounced to be one not of negligence but of nuisance or of consequential damages. *Ibid*; applying *Pottstown Gas Co. vs. Murphy*, 39 Pa., 257 (1861); *Robb vs. Carnegie*, 145 Pa., 324 (1891); distinguishing, *Pa. Coal Co. vs. Sanderson*, 113 Pa., 126 (1886).

Sec. 50. The Same.

One who bores for oil or gas is responsible for an injury to a neighboring water well, arising by the commingling by his well of salt and fresh waters percolating underground, where such injury was plainly to be anticipated and was preventable by the exercise of reasonable care at a reasonable cost. *Collins vs. Chartiers Valley Gas Co.*, 131 Pa., 143 (1890); *Same vs. Same*, 139 Pa., 111 (1891).

A succinct statement of the authorities is given by Mr. Justice MITCHELL in the former case, showing that no conflict exists as to the controlling principle. He concludes as follows (159) :

“ It is, therefore, clear, from the principles and the reasoning of all the cases, that the distinction between rights in surface and in subterranean waters is not founded on the fact of their location above or below ground, but on the fact of knowledge, actually or reasonably acquirable, of their existence, location and course.
* * * If the boundaries of knowledge have been so enlarged as to make an end of the reason, then, *cessante ratione, cessat ipsa lex*. Geology is a progressive, and now, in many respects, a practical science ; and, as truly remarked by the learned judge below, in his opinion on the motion for a new trial, ‘ since the decisions in *Acton vs. Blundell* and *Wheatley vs. Baugh*, probably more deep wells have been drilled in Western Pennsylvania than had previously been dug in the entire earth in all time. And that which was then held to be necessarily unknown, and merely speculative,

as to the flow of water underground, has been, by experience in such cases as this, reduced almost to a certainty.' If this is the state of knowledge at the present day ; if the existence of a *stratum* of clear water, and its flow into wells and springs of the vicinity, and the existence of a separate and deeper *stratum* of salt water, which is likely to rise and mingle with the fresh, when penetrated in boring for oil or gas, are known, and the means of preventing the mixing are available at reasonable expense, then, clearly, it would be a violation of the living spirit of the law not to recognize the change, and apply the settled and immutable principles of right to the altered conditions of fact. The learned judge, in his charge, said : 'There is evidence from which the jury could fairly find that the defendant, when the well was drilled, knew or ought to have known, if they had exercised any reasonable judgment, or investigated or paid attention to it, that the boring of this well in the way it was done, without shutting off the salt water from the fresh water, would almost inevitably ruin these and other wells in the immediate vicinity. And I think there is evidence from which the jury could fairly find that the defendant could, with the outlay of a small amount of money, have shut off the salt water from the fresh water, so that it could not have done any injury.' If the jury had found the facts, as this charge assumes, that they fairly might on the evidence, then the plaintiff had made out a case of negligence, and was entitled to recover. Negligence in this case is the absence of such care and regard for the rights of others as a prudent and just man would and should have in the same situation. If the plaintiff showed that the injury was plainly to be anticipated and easily preventable with reasonable care and expense, he brought himself within the exception of all the cases from *Wheatley vs. Baugh*, 25 Pa., 528, to *Penn'a Coal Co. vs. Sanderson*, inclusive."

Frazier vs. Brown, 12 Ohio, 294, would seem opposed to these views, but with the element of oil or gas in the case, and not merely "correlative rights as to underground waters," it is not improbable that the learned court would follow the Pennsylvania authorities.

Sec. 51. The Same—Indemnifying Bond.

In an action on a bond to indemnify and save harmless the obligee from all damages which she might sustain by reason of the drilling and operating of an oil well by the obligors, plaintiff proved that the water wells on her property were injured by the drilling of the oil well. The court charged that if the defendant did not do something to prevent the streams feeding the water wells from being drained off from the wells, they were guilty of negligence, and plaintiff was entitled to recover. *Held*, not to be error. *Steele vs. Todd*, 158 Pa., 515 (1893).

The following portion of the charge was not excepted to (C. P. Allegheny County, WHITE, J.):

“We have cases where an oil or gas well has been sunk 1500 or 2000 feet deep, and the salt water coming up has mingled with the fresh water above, and in that way destroyed water wells. If a man boring a gas or an oil well knows it is in a locality where salt water may come up and mix with the fresh water, he is bound to take such precautions as not to injure this fresh water by the salt water. If he can, by reasonable expenditure, care and caution, avoid that, and does not do it, he is liable for neglecting to do what he ought to have done to protect his neighbor. So he would be liable equally for draining off a stream that fed a well, if he could have guarded against it by reasonable care and prudence, and a reasonable expenditure.”

SUPPLY.**Sec. 52. Uses of Gas for Heat and Light Distinct.**

A manufacturing company supplied by a natural gas company with natural gas under a contract for use as a fuel only, but using gas from the company's mains for illuminating purposes also, is liable for the

reasonable value of the gas so consumed at the usual market rate. *Phila. Co. vs. Park Bros.*, 138 Pa., 346 (1890).

Sec. 53. Construction of Contract—Custom of the Parties—Popular Understanding in Gas Regions.

A natural gas company contracted to supply heat to a wire company, to be paid for at a certain price per ton, "for all iron or steel made from billets into wire," and another price per ton "for all iron or steel made from billets into wire rods, which is not made into wire." *Held*, that the tonnage upon which the gas was to be paid for was the tonnage of the finished product, and not of the steel billets from which the finished product was made.

In construing such a contract, it was not error for the court in its charge to refer to the uniform practice of the parties, both under the contract in question and under prior contracts, to accept reports and payments on the finished products as evidence of the construction which the parties themselves placed upon the contract. *People's Nat. Gas Co. vs. Brad-dock Wire Co.*, 155 Pa., 22 (1893).

In the construction of a contract for the use of natural gas on the streets of a borough, the court refused to enjoin the use of *open* lamps. The word "lamp" in such a contract must be construed according to the popular understanding, and that of persons familiar with the appliances used to light streets with natural gas. Thus construed, the word has the same meaning as burner, light or torch. *Saltsburg Gas Co. vs. Saltsburg*, 138 Pa., 250 (1890).

Sec. 54. In an Action for Gas Furnished Under Contract, Statement Should Aver That it Was Sufficient for the Purpose Contemplated.

Plaintiff agreed to furnish defendant with as much natural gas as was required to supply at least five boilers per day. It was *held* in an action for gas furnished, where the statement failed to allege that the amount of gas supplied was sufficient for the use of the boiler, that it was doubtful whether a right to judgment could be sustained even in the absence of an affidavit of defence. Further, that where the affidavit of defence averred that plaintiff did not supply enough gas to run the boilers, that defendant was obliged to expend large sums for coal to make up the deficiency of gas, etc., and stating specifically the value of the gas actually furnished, the affidavit was sufficient to prevent judgment. *Youghiogheny Nat. Gas Co. vs. Paper Co.*, 158 Pa., 559 (1893).

Sec. 55. Party to Whom a Special Rate Has Been Given by Gas Company for Valuable Consideration Will Not Be Protected by Preliminary Injunction Against Increase of Rates Upon Failure of Supply.

A natural gas company agreed to supply gas to plaintiffs, who, in consideration of their guaranteeing the debts of the company, were charged a lower rate than the public. The contract contained a clause obligating the gas company to furnish gas "so long as with ordinary diligence and outlay it can procure gas, and under the contracts now ordinarily in use by gas companies." Upon the failure of the gas, the rates were raised. Plaintiffs refused to pay the increased rates, and it was *held* that the refusal of

the lower court to award a preliminary injunction to restrain the company from cutting off plaintiffs' supply of gas would not be reversed on appeal. *Brown vs. Equitable Gas Co.*, 155 Pa., 359 (1893).

Sec. 56. Contracts Giving Preferences in Supply Void as Against Public Policy.

A contract made by a company incorporated under the Pennsylvania act of May 29, 1885, for the purpose of supplying natural gas to the public, with its own directors and stockholders, whereby they receive a preference over the public generally in the supply of natural gas, is contrary to public policy, and is void so far as it binds the gas company to furnish gas to its preferred stockholders and directors and their firms in preference to other parties similarly situated and for an indefinite period. *Crescent Steel Co. vs. Equitable Gas Co.*, 40 Pitts. L. J., 316 (1892). To same effect, *Shoenberger vs. Equitable Gas Co.*, 39 Pitts. L. J., 347 (1892).

CHAPTER IV.

FIXTURES.

Sec. 57. General Doctrine.

The implements, tools and movable goods used for mining purposes do not pass by a transfer of the mine or the right to work the same. But a different rule applies to the machinery annexed to the freehold. 15 Am. & Eng. Encyclopedia of Law, 512; Bainbridge on Mines and Mining, 203.

Sec. 58. Trade Fixtures Personal Property.

Fixtures erected by a tenant on the demised premises for the purpose of carrying on his trade, being accessory to the enjoyment of his term, are personal property during the continuance of the term. *Kile, Sheriff, vs. Giebner*, 144 Pa., 381 (1886). Following *Lemar vs. Miles*, 4 Watts, 330 (1835); *Church vs. Griffith*, 9 Barr, 118 (1848); *White's Appeal*, 10 Barr, 252 (1849); *Heffner vs. Lewis*, 73 Pa., 302 (1873).

Fixtures are not goods and chattels for all purposes. They are not, unless made so by the tenant's severance, or for the benefit of his execution creditors. While they remain attached, they are part of the freehold. *Darrah vs. Baird*, 101 Pa., 265 (1882);

citing *Minshall vs. Lloyd*, 2 M. & W., 450; *McIntosh vs. Trotter*, 3 M. & W., 184; *Overton vs. Wilson*, 7 Casey, 155.

Sec. 59. Oil-Well Machinery and Fixtures Subject to Levy.

In *Titusville Novelty Iron Work's Appeal*, 77 Pa., 103 (1874), a levy upon a writ of *fi. fa.* had been made upon "all the right, title, etc., of the defendants of, in and to a certain leasehold estate situate," etc., "together with the oil wells, engines, boilers, engine-houses, derricks, etc., etc., and *all the machinery and fixtures belonging to said well and lease.*"

Held, that the levy was good.

Sec. 60. Fixtures Placed on Property Subsequent to Mortgage Pass Under It.

A mortgage was made, pursuant to act of April 27, 1855, by a lessee of a term of years under a lease of a mill and the machinery mentioned in a schedule attached. After the execution of the mortgage, more machinery was put into the mill. *Held*, that the latter machinery passed by a sale under the mortgage. *Ladley vs. Creighton*, 70 Pa., 490 (1872).

Per AGNEW, J.:

"It would be a narrow and illiberal interpretation of the act of 27th April, 1855, to say that it means to confine the lien of the mortgage to the precise machinery in a building at the time of its execution. Very few manufactories of any kind can run a year or even months, without the substitution of new parts for those worn out, broken or otherwise rendered useless. A woolen-mill, cotton-mill, rolling-mill or other factory must be looked upon as a whole, and all its parts as contributing to the success of its business. It must, therefore, be constantly kept in operating condition

by the renewal of those parts which become worn out or useless, extending frequently to entirely new machines. Now, to say that the mortgage bears upon the old parts only and not the renewed, would deprive it of much of its value. There would be both the want of value in the remaining parts, and the uncertainty of the purchaser as to what he would get, to deter bidders at the judicial sale. Now, all that this bill of exceptions informs us is, that the executions mentioned this machinery as having been added to or substituted. We find nothing the court below could safely rest upon, to charge that the machinery was so entirely independent as to fall outside of the description in the mortgage."

And this language, *mutatis mutandis*, is just as applicable to the machinery used in and about an oil well.

To the same effect, *Morris' Appeal*, 88 Pa., 368 (1879).

Sec. 61. The Intention to Annex—The Criterion.

Under the earlier decisions upon the question of determining what are removable fixtures, physical annexation was undoubtedly the test. But this doctrine no longer prevails. The true criterion is the intention to annex. *Seeger vs. Pettit*, 77 Pa., 437 (1875); citing *Voorhis vs. Freeman*, 2 W. & S., 116; *Pyle vs. Pennock*, 2 W. & S., 390; *Hill vs. Sewald*, 3 P. F. S., 271.

Sec. 62. After Expiration of Term, Oil Well Machinery Becomes Property of Land Owner, if not Removed During Term or in a Reasonable Time.

The casing in an oil or gas well, the derrick and other appliances used in drilling and operating the well, are trade fixtures, and may be removed by the owner or lessee during the term of the lease; but

they become the property of the land owner if not removed by the lessee during the term, or, at least, within a reasonable time after its expiration. And this, notwithstanding a covenant in the lease that the lessee should have "the right to remove *at any time* all machinery, oil well supplies or appurtenances of any kind belonging to the lessee." *Shellar vs. Shivers*, 171 Pa., 569 (1895).

Said McILVAINE, P. J., upon whose opinion in the lower court, the judgment was affirmed :

"The lease was for a fixed period to be extended to an indefinite period, and the extension to depend upon what the future might develop. The right to enter at any time, and the right to remove machinery at any time, was predicated of that part of the term that was uncertain, that is, after three years the lessee had the right at any time to enter and drill additional wells, if oil or gas was being produced in paying quantities; and had the right, although the three years had passed, to remove the machinery and fixtures after or when the well would cease to produce oil or gas in paying quantities.

"If this construction is correct, then the rule of law as to removal of fixtures would be as in cases where the tenancy is uncertain in duration, as when it depends upon a contingency, and that is, that the removal must be made within a reasonable time; or in other words, the law in such cases allows the tenant a reasonable time for the removal of fixtures. Here the lessees, if oil or gas had been found in paying quantities, would have had a reasonable time within which to draw their casing and remove their derricks after it had become apparent that the operation of the wells was no longer profitable, let this be soon or long after the expiration of the three years; at any time when they thought it would no longer pay to operate their wells which had been producing oil or gas in paying quantities, they had a right to remove the fixtures connected with such wells.

"Under the facts as we have them in this case, however, operations ceased on this lease in April, 1887; a dry hole was found, nothing was done between the completion of this well and

the time when the lease expired in November, 1888, and after that four years are allowed to expire before an attempt to remove these fixtures was made. In our opinion, this was too late. If, under the words 'at any time,' the lessee could take four years after the expiration of the lease to remove his fixtures, he could as well take twenty years. To say that the lessor could prevent this by giving notice that the fixtures must be moved within a certain time, is to read something into the contract that is not there." Cf. *Taylor Landlord & Tenant*, Sec. 545; *Lemar vs. Miles*, 4 Watts, 332 (1835); *White vs. Arndt*, 1 Whar., 91 (1836); *Watts vs. Lehman*, 107 Pa., 111 (1884); *Carver vs. Gough*, 153 Pa., 228 (1893); *Hill vs. Sewald*, 53 Pa., 271 (1866); *Seeger vs. Pettit*, 77 Pa., 437 (1875); *Morris' Appeal*, 88 Pa., 368 (1879); *Vail vs. Weaver*, 132 Pa., 363 (1890).

In the last-named case, the court say :

" Mere physical annexation is no longer the rule * * * The intention to annex, whether rightfully or wrongfully, is the legal criterion."

Sec. 63. Entry for the Purpose of Cleaning Engines not a Continuance of Mining Operations.

Where, by the terms of a lease, it was provided that, if lessee should cease mining operations for twelve consecutive months, it should become void, the entry of the lessees from time to time, to clean and grease an engine, which had been erected on the premises and used in mining, was not a continuance of mining operations within the terms of the lease, and would not prevent a forfeiture. *Davis vs. Moss*, 38 Pa., 346 (1861).

Sec. 64. Doctrine in Indiana.

A tenant has a right to remove buildings which had been erected by him on demised premises for purposes of trade, or of his better enjoyment, the

relation of landlord and tenant existing, at any time before termination of lease, without any agreement between parties. This rule applies where tenancy is for a certain and definite period. Where tenancy is for an uncertain time, or on a contingency, tenant may exercise his right in a reasonable time after term. *Cromie vs. Hoover*, 40 Ind., 49 (1872); *Allen vs. Kennedy*, 40 Ind., 142 (1872).

Sec. 65. Abandonment Presumed.

If tenant does not, during or at expiration of term, remove fixtures erected by him, he will be presumed to have abandoned them, but such presumption may be rebutted by proof of parol agreement, reserving to him property in them and right to remove them after expiration of term. *McCracken vs. Hall*, 7 Ind., 30 (1855).

Sec. 66. Option Confers No Title as Against Execution Creditors.

Where, under a lease of coal lands, the lessor reserves the option of buying the tenant's fixtures at the end of the term, such option will not give the lessor any title to the fixtures, as against execution creditors until the same are appraised and accepted. *Seitzinger vs. Marsden*, Sup. Ct., Pa., 13 P. L. J., 279; 2 Penny., 463 (1882).

CHAPTER V.

LEASES.

A lease is a contract for the possession and profits of land for a specified period with the recompense of rent ; it is the grant of *an interest in the land*. But a license to mine is a mere incorporeal right to be exercised in the lands of others. It is a profit *a prendre*, and may be held apart from the possession of the land. Bainbridge M. & M., (261) ; Am. & Eng. Cyc. Law, 594, and cases cited. Title, "Nature and Right of Property," *supra*.

Generally a parol license is revocable at the will of the licensor, and it is revocable, even though a consideration be paid for it. But it has been held that even a parol license executed may become an easement upon land, and that when acts have been done by one party in reliance upon a license granted to another, the latter will be equitably estopped from revoking it to the injury of the former. *Dark vs. Johnston*, 55 Pa., 164 (1867) ; citing *Resick vs. Kern*, 14 S. & R., 267 ; *Lacey vs. Arnett*, 9 Casey, 169 ; *Lefevre vs Lefevre*, 4 S. & R., 241.

Sec. 67. The Intention of the Parties Must Control.

In construing a coal lease, the mere use of technical words and phrases, which have a definite legal

signification cannot be allowed to defeat the contrary intention of the parties, if that intention be manifest from the whole contract. Thus the words demise, lease, let, lessors and lessees, and like words specially appropriate to a contract between the owner and tenant for years, have no bearing if the contract is, in fact, not a lease of the coal in place. *Coal Co. vs. Wright*, 177 Pa., 387 (1896).

And no reason is perceived why the same rule should not apply equally to oil and gas leases. As to "Words and Phrases," see this chapter, *infra*.

Sec. 68. Assignability of a License.

The court, in *Dark vs. Johnston*, *supra*, says :

"A license is a personal privilege and not assignable; an assignment by a licensee determines his right. Though a licensor may be estopped from recalling the privilege granted, the licensee may destroy it. He may abandon or release. He cannot substitute another to his right."

The court mentions the fact, however, that the license was given to the licensee "and not to his assigns."

Sec. 69.

The lessee under an oil lease who has exclusive possession of the land for the purpose of searching for, producing, storing and transporting oil has more than a mere license in the land. *Kitchen vs. Smith*, 101 Pa., 452 (1882).

But the distinction between leases and licenses, while of interest in other forms of mining, is not now of sufficient importance to require further elaboration here, the acquisition of title by license to oil property

being at the present time practically obsolete in Pennsylvania, though asserted to exist under that name in Ohio, to the decisions of which State proper attention will be given later.

COVENANTS.

Sec. 70. Covenants Running with the Land.

In equity the test by which to determine whether a covenant in a deed runs with the land is the intention of the parties; to ascertain such intention, resort must be had to the words of the covenant, read in the light of the surroundings of the parties and the subject of the grant. *Landell vs. Hamilton*, 175 Pa., 327 (1896).

Sec. 71. A Covenant to Use Due Diligence Runs with the Land.

An oil lease contained a covenant by lessee to use due diligence in operating the well: *Held*, that it ran with the land and that the measure of damages for breach of the covenant is the value of the oil which the lessor would have received, less the cost of operating it and the value of the oil actually received. *Bradford Oil Co. vs. Blair*, 113 Pa., 83 (1886).

The same lease contained a covenant to continue with due diligence and without delay to prosecute the business to success or abandonment, and, if successful, to prosecute the same without interruption for the common benefit of the parties. *Held*, to mean that in the event of success, exploring and drilling for oil should be continued without interruption, as well as gathering and collecting the oil already struck. *Ibid*.

Sec. 72. And a Covenant to Pay Rent or Royalty.

Fennell vs. Guffey, 139 Pa., 341 (1891); *Springer vs. Gas Co.*, 145 Pa., 430 (1891); *Fennell vs. Guffey*, 155 Pa., 38 (1893).

Sec. 73. No Implied Covenant that Land is Fit for Mining Purposes.

There is no implied contract in a lease of land that it is fit for the purpose for which it is let; neither is there any implied warranty in the lease of a mine that it contains the mineral which is supposed to be in it. In the absence of a special contract or of misrepresentation or fraud, or of the injurious or wrongful acts or omissions of the landlord, a tenant of land or unfurnished buildings cannot properly refuse to pay rent on the ground that the land was or became unfit for the purposes for which it was taken. *Bamford vs. Zinc & Iron Co.*, 33 Fed. Rep., 677 (1887); citing *Harlan vs. Lehigh Co.*, 35 Pa., 287; *Sutton vs. Temple*, 12 M. & W., 52; *Minor vs. Sharon*, 112 Mass., 497; *Foster vs. Peyser*, 9 Cush., 242.

Sec. 74. Covenant to Pay Minimum Rent.

This case was carried to the Supreme Court of the United States (150 U. S. R., 665, 1893), and affirmed upon other grounds, one of which was the following: The owners of a mine leased it to parties upon a royalty. It was further agreed that in case the royalty should in any year fall below \$1000, the lessee should pay an additional sum equal to the difference. There was also a provision for relinquishment of the lease in the event of a failure to find sufficient ores to yield such minimum payment. It was *held* that the lessee engaged to pay as rent in each year the royal-

ties fixed in the lease ; and if, in any year the royalties fell below \$1000, lessees should make up the deficit, so that the latter sum should in any event be paid annually as rent.

Sec. 75. Covenants Personal between Lessor and Lessee.

A condition in an oil or gas lease, duly recorded, whereby lessees shall have a right to operate land of lessor adjoining the tract named in the lease, provided lessor elects to have said additional territory operated, is personal between the lessor and lessee. The former, not having elected to have such land operated, a *bona fide* purchaser from the lessor takes the same free from any right of lessee. The purchaser is bound to enquire and know only whether the lessor had elected to have the land operated according to the terms of the lease. *Emerine vs. Steel*, 8 Ohio C. R., 381 (1894).

Sec. 76. Mining Right Sometimes a Personal Privilege, if the Intention be Clear.

A testator by will provided as follows : " To my second son John, I give and bequeath the plantation he now occupies, to be enjoyed by him, *his heirs and assigns forever*, with free privilege of taking *what coal he wants for his own use* off the home plantation." When the will was made, there was an open mine on the home plantation, but none on the farm occupied by John. *Held*, that the privilege of taking coal from the home plantation was personal to John, and did not pass to his successors in title to the land devised to him. *Coal Co. vs. Pierce*, 153 Pa., 74 (1893).*

*And similar provisions for "gas for domestic use" are not unfamiliar.

Sec. 77. Exception—Reservation—Limitation.

An exception is a clause in a deed whereby the donor or lessor excepts somewhat out of that which he had granted by his deed. Always part of the thing granted and the whole of the part excepted. Anderson's Law Dictionary, *in loc.*

A reservation in a deed is the creation of a right or interest which had no prior existence as such, in a thing or part of a thing granted. By a reservation in a deed a *new right* is created in the thing granted which is reserved to the grantor. The terms "exception" and "reservation" are often used in the same sense. Though apt words of reservation be used, they will be construed as an exception, if such was the design of the parties. *Ibid.*

A limitation in deeds and devises marks out an interest in property: the restricted duration of an estate. *Ibid.*

Sec. 78.

The subject was treated fully in the case of *Whitaker vs. Brown*, 46 Pa., 197 (1864). In that case there was a clause in the deed "saving and reserving" to the grantor for his own use the coal in the land, and the court held that, although these were apt words to constitute a reservation, yet they operated as an exception, "because the coal was a corporeal hereditament, *in esse*, at the date of the deed, part of the land itself, and, therefore, not the subject of a reservation." It left the grantor the same dominion and proprietorship over the coal as if the deed had not been made.

The opinion by that learned judge, WOODWARD, quotes from Thomas Co. Lit., star page 412 :

“ Note a diversity between an exception (which is ever a part of the thing granted and of a thing *in esse*) and a reservation, which is always of a thing not *in esse*, but newly created, or reserved out of the land or tenement demised.”

And from Sheppard's Touchstone to the same effect (p. 80) :

“A reservation is a clause of a deed whereby the feoffor, donor, lessor, grantor, etc., doth reserve some new thing to himself out of that which he granted before. This doth differ from an exception which is ever part of the thing granted, and of a thing *in esse* at the time ; but this is of a thing newly created, or reserved out of a thing demised that was not *in esse* before. * * * If one grant land yielding for rent money, corn, a horse, spurs, a rose or any such thing, this is a good reservation ; but if the reservation be of the grass or of the vesture of the land, or of a common or other profit to be taken out of the land, then these reservations are void.” “Void, I take it the meaning is,” adds Justice WOODWARD, “as reservations, but capable of support as exceptions.”

In *Shoenberger vs. Lyon*, 7 W. & S., 184 (1844), the words “excepting and reserving” were construed as an exception, but were set aside on the principle that every saving in a deed as large as the grant is void.

Sec. 79.

A grant or exception of mines confers or reserves the right to work them without express words to that effect. Bainbridge, M & M., 101.

Sec. 80.

A reservation by the grantors in a deed of “all minerals” does not include petroleum oil. The grantors may not, therefore, by virtue of such

reservation, enter and take petroleum oil. If they do, they are liable in trespass. *Dunham vs. Kirkpatrick*, 101 Pa., 36 (1882). See, however, Section 4, for a fuller statement of this case.

Sec. 81. Clauses in a Lease Excepting a Certain Area from Drilling Operations Construed as Limitations.

When the premises embraced in an oil or gas lease are described as "all that certain tract of land," etc., a clause providing that no wells shall be drilled within a limited area is neither an exception nor a reservation, but simply *a limitation upon the privilege* of drilling granted to the lessee, confining his drilling outside the area specified.

"The clause in question," said the court, "does not in any way diminish the area of the land leased; that is still the whole tract; but it restricts the operations of the lessees in putting down wells to the portions outside of the prohibited distance. *For right of way and other purposes of the lease, excepting the location of wells, the space inside the stipulated lines is as much leased to the lessee as any other part of the tract.* The terms of the grant would imply the reservation to the lessor of the possession of the soil for purposes other than those granted to the lessee, and the parties have expressed what otherwise would have been implied by the provision that 'the lessor is to fully use and enjoy the said premises for the purpose of tillage, except such part as shall be necessary for such operating purposes.' From the nature of gas and gas operations, already discussed, the grant of well-rights is necessarily exclusive. It was so held, even as to oil wells, in *Funk vs. Haldeman*, 53 Pa., 229, 247, 248, although in that case the plaintiff had a mere license to enter, etc., and not, as complainant here, a lease of the land; and it is exclusive, in the present case, over the whole tract. As already said, the clause relative to the three hundred yards distance was a restriction on the privilege granted, *not a reservation of any land* or any boring rights to the lessor; and a well upon the prohibited portion was just as damaging to the lessees as upon any

other portion of the tract. The drilling of the well threatened by respondent is, therefore, in violation of the lease, and should be enjoined if the lease is still in force." *Westmoreland Nat. Gas Co. vs. DeWitt*, 130 Pa., 251 (1889).

To the same effect, *Duffield vs. Hue*, 136 Pa., 602 (1890). Followed in *Brown vs. Spilman*, 155 U. S. R., 665 (1895).

Sec. 82. But in the Case of an Express Reservation of Part of the Tract, Lessor May Lease Such Part to Third Parties.

An oil and gas lease embraced a farm of thirty-seven acres, "reserving seven acres upon which there shall be no wells drilled by second parties." *Held*, that the lease did not confer upon lessee an exclusive right to the oil and gas under the tract reserved, or prevent lessor from letting the same to other parties.

Per McMICHAEL, J.:

"I have not been able to discover any intelligent meaning which can be given to the words in this clause other than that it was intended to express by them the purpose and agreement that the lessees should not acquire by the lease any interest or right of any character in the seven acres." *Guffey vs. Deeds*, 9 Pa. Co. Ct. R., 449 (1890).

Sec. 83. Reservation of "Mining Privileges."

A deed offered by grantor "excepting and reserving all gas, oil, coal, ores and other mineral deposits in, under or on the said premises" is not a compliance with an agreement to convey the premises "reserving all oil and gas in or under the said lands, with free mining privileges of all kinds." The language is to be taken most strongly against the grantor. "Mining privileges" are appropriate words

to describe the process by which oil and gas are obtained, and are properly incident to a grant of them. The other minerals having been granted, the incident of mining would have passed with them ; but the granting or reserving of the incident alone would not carry with it the principal. *Moody vs. Alexander*, 145 Pa., 171 (1892).

Sec. 84. Lessor Acquiescing in Operations Upon Reserved Territory, Lessee is Entitled to Continuance of Lease After Expiration of Original Term.

An oil and gas lease was for the term of three years and as much longer, etc. A reservation was made of four acres around the buildings, upon which no wells were to be drilled without the written consent of both parties. The only producing wells under the lease were two drilled within the limits of the reservation which continued to produce oil in paying quantities after the three years named in the lease. The lessor consented in writing to the drilling of one of the producing wells, and acquiesced in the drilling of another, and received his share of the oil in accordance with the provisions of the lease. *Held*, that the lessee was entitled to a continuance of the lease after the expiration of the three years. *Balfour vs. Russell*, 167 Pa., 287 (1895).

Sec. 85.

Upon a *grant* of ore lands reserving one-eighth of all the minerals or oil product produced, to be divided between the parties on the land, it was *held* that the language of the reservation designated a

right in the grantor to the one-eighth of the oil raised to the surface by the grantee at the pleasure and expense of the grantee, and that as then and not till then could the "product" be said to be produced, grantor was entitled to his share without any deduction for expenses in producing. *Union Oil Co.'s Ap.*, 3 Penny. (Sup. Ct. Pa.), 504 (1883).

Sec. 86. "Rights not Intended to be Conveyed."

In *Acheson vs. Stevenson*, 146 Pa., 228 (1892), a deed conveyed a town lot, adjoining other lands of the grantor, with the *habendum*: "To have and to hold the said premises, * * * without, however, the right to drill or mine for petroleum, carbon oil or natural gas, which right is not intended to be conveyed, but is forbidden to both parties hereto." The grantee afterwards drilled a producing oil well on the lot conveyed.

On a bill filed by the grantor for an injunction, account and general relief, the master reported a finding, which was approved, that the plaintiff had failed to establish his material averments (1) that the title to the oil in the lot conveyed was in himself, and (2) that the purpose of the provision was to protect his unsold lands from being drained by operations for oil on lots sold.

But the plaintiff was adjudged to be entitled to an injunction restraining the defendant from operations for oil on the lot conveyed, in violation of the restrictive covenant, thereby rendering the neighborhood less desirable for residences; but not to an account for damages measured by the amount of oil obtained by the defendant in his operations.

MEASURE OF DAMAGES FOR BREACH OF COVENANT.**Sec. 87. Breach of Covenant to Prosecute Business.**

It was not error for the court to instruct the jury that the damages for the breach of a covenant "to continue * * * to prosecute the business to success or abandonment, and if successful to prosecute the same without interruption for the common benefit of the parties," would be found as follows :

"Ascertain how much more oil the plaintiff ought to have received than he actually did receive, and the value of it during the times when it should have been delivered to him. From this deduct the cost of producing what ought to have been produced at the time, under the circumstances and with the appliances then known, and add to this remainder the interest on it from the time that the oil ought to have been produced to the present time ; and this will be the measure of damages sustained by the plaintiff." *Bradford Oil Co. vs. Blair*, 113 Pa., 83 (1886).

Sec. 88. Lessor and Lessee of Salt Wells, where Oil has Risen.

In *Kier vs. Peterson*, 41 Pa., 357 (1862), in a dispute between lessor and lessee of certain land for the purpose of boring salt wells, oil having subsequently risen with the salt water, it was *held* that the remedy of the owner of the land was by bill in equity, and the measure of his damages the value of the oil at the instant of separation from the freehold.

In *Forsyth vs. Wells, Id.*, p. 291, a case of coal mined and carried away from another's land by mistake, LOWRIE, C. J., states the law clearly and learnedly, concluding as follows :

"When there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the purpose of all remedies ; and so long as we bear this in mind, we

shall have but little difficulty in managing the forms of actions so as to secure a fair result. If the defendant in this case was guilty of no intentional wrong, he ought not to have been charged with the value of the coal after he had been at the expense of mining it; but only with its value *in place*, and with such other damage to the land as his mining may have caused. Such would manifestly be the measure in trespass for mesne profits." *Morrison vs. Robinson*, 7 Casey, 456 (1858). See, also, *Herdic vs. Young*, 55 Pa., 176 (1867).

Chamberlain vs. Parker, 45 N. Y., 569 (1871), may be referred to upon the general question, but the terms of the lease in that case (no rent reserved and no term of demise stated), are so unusual at the present time as not to demand a detailed examination here as a case in point. See also *Carl vs. Granger Coal Co.*, 69 Iowa, 516.

Sec. 89. Tenants in Common—Fraudulent Concealment.

A tenant in common who has been tortiously deprived by the fraud of his co-tenant of his interest in an oil leasehold, is entitled, in a suit brought for his share of the oil produced and converted by the co-tenant while in possession, to recover as damages the value of the oil in the tank, without deduction for the expenses of production. *Foster vs. Weaver*, 118 Pa., 42 (1888); Cf. *Noble vs. Biddle*, 81 Pa.*; 32 P. F. Smith, 430; *Ege vs. Kille*, 84 Pa., 333 (1877).

The judgments of the Pennsylvania courts in actions at law of this nature, have been controlled by the principles of equity.

"Who does iniquity shall not have equity." *Frances Max.*
VII.

The law cares very little for what a fraudulent party's loss may be and exacts nothing for his sake.

Mason vs. Bovet, 1 Den., 74; *Gichenheimer vs. Angevine*, 81 N. Y., 394; *Hammond vs. Pennock*, 61 N. Y., 145.

In such cases, the same rule prevails in actions between tenants in common as between strangers. *Crest vs. Jack*, 3 Watts, 239 (1834); *Gregg vs. Patterson*, 9 W. & S., 209 (1844).

Sec. 90. Doctrine as Stated by U. S. Supreme Court.

The doctrine as to timber lands, as stated by the Supreme Court of the United States, is as follows:

"Where the plaintiff, in an action for timber cut and carried away from his land, recovers damages, the rule for assessing them against the defendant is: (1) Where he is a willful trespasser, the full value of the property at the time and place of demand, or of suit brought, with no deduction for his labor and expense; (2) Where he is an unintentional or mistaken trespasser, or an innocent vendee from such trespasser, the value at the time of conversion, less the amount which he and his vendor have added to its value; (3) Where he is a purchaser without notice of wrong from a willful trespasser, the value at the time of such purchase."

Sec. 91. The Value of the Mineral Undeveloped Must be Considered.

In *Lyon vs. Miller*, 24 Pa., 392 (1855), it was said:

"For the coal actually mined the contract had fixed the measure of compensation; but for that which ought to have been mined but was not, the court instructed the jury that the plaintiffs 'were not entitled to the stipulated rate, because they still had the coal in the mine.' The coal in the mine was 'certainly worth something. As matter of law the court was bound to consider it as possessing some value. It was therefore proper to direct the jury to ascertain the value and deduct it from the stipulated rate. On this part of plaintiffs' claim, the measure of damages is the difference between the stipulated rate of compensation and the value of the coal in the mine.'"

Sec. 92. Stocks and Oil not Governed by the Same Rule.

Where a grantor of oil lands expressly reserved the one-eighth part of the oil produced, it was *held*, upon failure to deliver his share, that the measure of damages was the actual market value of the oil at the date of refusal to deliver, with interest from that date. The rule applicable to stocks, on a failure to deliver, should not be applied to a chattel like oil. *Union Oil Company's Appeal*, 3 Penny., 504 (1883).

Sec. 93. Doctrine of Substantial Performance—Contract for Well of Certain Measurement not Fulfilled by Well of Smaller Dimensions, Though Equally Effectual.

In *Gillespie Tool Co. vs. Wilson*, 123 Pa., 19 (1888), it was *held* that, if the contract is to drill a well of a certain depth and width, digging one of the required depth, but of a less width, is not a compliance with the contract, and there can be no recovery, even if no gas is found, although the one dug was as effectual in determining whether gas could be found there as the wider one. When the plaintiff in an action upon a contract in such a case invokes the equitable doctrine of substantial performance, he must present a case disclosing no wilful omission or departure from the terms of the contract.

Per STERRETT, J.:

"The equitable doctrine of substantial performance is intended for the protection and relief of those who have faithfully and honestly endeavored to perform their contracts in all material and substantial particulars, so that their right to compensation may not be forfeited by reason of mere technical, inadvertent or unimportant omissions or defects."

See, also, as to measure of damages, Chapter X, "Working out of Bounds."

RENTS AND ROYALTIES.

Sec. 94. Rents and Royalties—When Due.

Where no time is fixed for the payment of the annual rent except when a well is completed and accepted, rent is not due, where lessee failed to drill and complete a well, until the end of the year. *Evans vs. Consumers Gas Co.*, Ind., S. C., 31 L. R. A., 673 (1891); *Watson vs. Penn*, 108 Ind., 21; *Elmer vs. Sand Creek Tp.*, 38 Ind., 56; *Raymond vs. Thomas*, 24 Ind., 476.

And in *Lynch vs. Versailles Gas Co.*, 165 Pa., 518 (1895), where there was a stipulated rent payable for delay in putting down a well, and no date was expressed for the payment of such rent, it was *held* to fall due by operation of law at the close of each year.

Sec. 95. Attempts to Avoid Liability.

An attempt to surrender a lease about two months before the expiration of a year for which a stipulated rental is payable on default of the completion of a well, will not discharge the lessee from liability to pay the rental. *Breckenridge vs. Parrott*, (Indiana), 44 N. E., 66.

Lessee in lease allowing him "at any time to surrender up this lease" cannot escape liability for a payment that has become due under the lease, for failure to complete a well by subsequently surrendering the lease. *Aderhold vs. O. S. W. Co.*, 158 Pa., 481 (1893).

But where the lease calls for a specified annual rental "for each well from which gas is used," the shutting off of the gas from a well which has become unprofitable and notifying the lessor of that fact before the commencement of a rental year will terminate the liability of lessee. *Gas Co. vs. Teters* (Ind. App.), 44 N. E., 549. Cf. *Double vs. Union Heat & Light Co.*, 172 Pa., 388.

Sec. 96. Royalties on Different Tracts, Subject to Same Lease, Devised to Different Parties, Divisible.

Where three tracts of land, all subject to the same oil and gas lease, are devised respectively to the owner's three children, the accruing royalties are divisible among the three devisees, although all of the wells are sunk only on one tract. The rule is different in regard to coal, and grows out of the vagrant character of the first-mentioned minerals. *Wettengel vs. Gormley*, 160 Pa., 559 (1894).

Sec. 97.

Recovering in one action arrears of a portion of oil due to a lessor as royalty under a lease was *held* to bar his claim in a subsequent suit for damages for the lessee's failure to operate on all the premises. *Hill vs. Joy*, 149 Pa., 243 (1892).

Sec. 98. Lessor's Royalty Preferred to Claim of Mortgagee of the Leasehold.

In a suit for the foreclosure of a mortgage of a lease of lands for the purpose of mining coal and iron, the lessor, by the terms of the lease retaining a

royalty, has a right to be paid before the mortgagee out of any funds arising out of the sale of coal or iron mined on the premises and paid into court. *Childs vs. Hurd*, 32 W. Va., 66 (1889).

Sec. 99. Lessee's Refusal to Permit Designation of Boundaries will not Prevent Recovery of Rent.

In an action to recover on a lease in which the land was described as eighty acres of a certain tract, "reserving therefrom sixty acres around the buildings on said premises," the boundaries to be designated by the party of the first part, the complaint averred that the lessor was ready at all times to locate the boundaries, but that defendants refused to permit the same to be done. *Held*, to show a sufficient excuse for not complying with that provision of the lease. *Indpls. Gas Co. vs. Spaugh*, Ind., 46 N. E. R., 691 (1897).

Sec. 100. Covenant to Sink Wells Cannot be Avoided by Showing that the Performance would not Benefit the Grantee.

A covenant in a lease that lessee will sink three wells or pay a certain annual sum for default cannot be evaded by showing that expert opinion indicates that the sinking of three wells might reduce the flow of gas and be a positive harm to wells already sunk, thereby reducing lessor's profits. The covenant is an absolute and unqualified covenant for the benefit of the lessor, and he has the right to enforce it. *Young vs. Gas Co.*, 5 Pa. Super. Ct., 232 (1897).

Sec. 101. Waiver of Rental—Parol Evidence.

In an action brought to recover royalties under a written lease for the term of *one year*, parol evidence was admitted to show a waiver of rental. *Crawford vs. Gas Co.*, 183 Pa., 227 (1897).

Sec. 102. Payment of Rent to Co-tenants Jointly.

Where co-tenants join in a lease reserving a common rent payable to the lessors jointly, either of them may receive and give a valid receipt for the entire rent, until notice from one or more of the co-tenants that his share must be paid to himself. *Swint vs. M'Calmont Oil Co.*, 184 Pa., 202 (1898).

CONSTRUCTION.**Sec. 103.**

Under a lease which grants to lessee a tract of land with the exclusive right of boring for oil thereon, but restricts his operations to certain specified sites, the lessee has no right of possession such as will support ejectment as to any land outside the designated sites. But he has the protection of the entire premises, and equity has jurisdiction to restrain the lessor from drilling wells thereon outside of such designated sites, and thereby lessening the production of wells drilled by the lessee, such injury being destructive of his rights and incapable of adequate remedy at law. *Duffield vs. Hue*, 136 Pa., 602 (1890). Following *Duffield vs. Hue*, 129 Pa., 94 (1889).

Sec. 104.

The lessees of land, demised to them for the production of oil alone, who obtain gas but not oil, and are thereupon dispossessed by ejectment brought upon a forfeiture alleged, have no equity to be reimbursed the expenses of their operations out of the proceeds of the gas obtained. *Palmer vs. Truby*, 136 Pa., 556 (1890).

PAXSON, C. J.:

"It was a speculation pure and simple, in which the lessees assumed all the risk. They did so for the chance of getting seven-eighths of the oil. Upon what principle of equity can this risk be shifted upon the lessors and they be required to pay for the expenditures which the lessees agreed to make at their own risk? It will be seen at a glance that there is no analogy between such case and that of a person who is in possession of land under color of title, and innocently builds a house or barn, or makes other valuable and permanent improvement upon it. In such case, in an action for mesne profits, he may justly be allowed for the value of such improvements to the extent they have increased the value of the property. But here the lessees did nothing but what they had agreed to do at their own risk."

Sec. 105. Operating Expenses to be First Paid.

An oil lease, after providing for a payment of a royalty on the oil produced, further provided that "if gas is obtained in sufficient quantities and utilized off these premises, the consideration shall be the use thereof for domestic purposes and one-eighth of the gas sold for every gas well drilled on the premises herein described and piped off the same." The lessees were to have gas in sufficient quantities for the operation of the lease. *Held*, that the lease only gave to the lessor the right to the gas if it was

obtained in sufficient quantities, *after* the lessees had used the gas for the purpose of operating their lease in a reasonable and proper manner. *Fanker vs. Anderson*, 173 Pa., 86 (1896).

Sec. 106. Sale of Lease does not Include the Severed Mineral.

The word "lease" has a definite legal signification, and a contract in writing selling a "lease" does not carry with it oil that had theretofore been pumped from an oil well on the land so leased. It was claimed that the contract in the case was so vague as to allow the introduction of parol testimony to explain it, and to show that it was intended thereby to sell the oil that had been pumped from the well. But the court *held* that there was no ambiguity, and refused to hear parol testimony recognizing the well-settled rule that, where there is no ambiguity in a written contract, parol evidence is inadmissible to contradict or vary its terms. *McGuire vs. Wright*, 18 W. Va., 507 (1881); *Dresser vs. Transportation Co.*, 8 W. Va., 558 (1875).

Sec. 107.

Plaintiff leased to defendant a farm for the sole purpose of developing oil, plaintiff to receive one-eighth of the product. Subsequently, the parties entered into a supplemental contract in writing in reference to an existing oil well on the farm, as follows: If it should for thirty days produce a daily average of five barrels of oil, defendant to pay plaintiff \$250; if ten barrels, \$500; "should the second well provided for in lease in like manner produce fifteen barrels, defendant to pay plaintiff the further sum of

\$1000. Explanation: The understanding and agreement in regard to the test-well being that plaintiff is in no event to receive exceeding the sum of \$500." The first well, an old one, failed to produce oil. The second produced more than fifteen barrels a day for thirty days. Defendant claimed, as a defence to an action of *assumpsit*, that the use of the words "in like manner" and "further" indicated that the sum to be paid upon the production of the second well was dependent upon the production of the first, and that, having failed, nothing was payable on the second.

Held, that the sums to be paid under the agreement were in the nature of a bonus to be paid upon the production of the wells, and that lessee was bound for the payment on the second well, though the first produced nothing. Judgment on special verdict for \$1000, with interest. *Brushwood Developing Co. vs. Hickey*, 2 Mon., 65 (1888), Sup. Ct. Pa., S. C., 16 Atl. R., 70.

Sec. 108.

The owner of a farm made leases for oil purposes, reserving as royalty one-eighth of the oil produced. His son, who was of full age and lived on the farm with his father, was joined as co-lessor. The oil reserved as royalty was delivered to the father and his vendees. *Held*, in an action by the son against the lessees to recover one-half of the royalties, that defendants might show the circumstances under which plaintiff signed the leases, not to deny the landlord's title, but to deny that, as to the son, the leases created that relation. *Swint vs. McCalmont Oil Co.*, 184 Pa., 202; S. C., 38 Atl. R., 1020 (1898).

Sec. 109. Uncertainty of Description — In construing Leases, the Courts Lean Towards the Party of the Second Part.

An owner of three adjoining tracts of land, each containing forty acres, leased *one acre* thereof, to be designated by himself, and in the lease it was "agreed on the part of the party of the first part that if oil or gas be obtained by the second party or assigns * * * upon said tract, or on lands adjoining the same premises of which the foregoing one acre described embraces a part, said second party shall have the right to operate forty acres of the balance of said premises on the same terms as above." *Held*, that the forty-acre tract out of which the one acre was thereafter selected by the party of the first part, is the forty acres to be operated under the contract. Further, the party of the first part, having selected the one acre upon which such well was to be drilled and the second party having acted thereon, the first party is bound thereby, and cannot make a second selection. *Stahl vs. Van Vleck*, 53 Ohio St., 136 (1895).

Sec. 110. Modification of Lease by Parol Agreement.

Per TRUNKEY, J.:

"Verbal agreements, made between the parties, before or at the time of the execution of a written contract, are considered as merged therein, and in general are inadmissible to vary its terms. But an oral agreement, *subsequently made, on a new consideration, and before the breach of the contract*, in cases falling within the general rules of the common law, and not within the statute of frauds, may have the effect to enlarge the time of performance specified in the contract, or may vary any other of its terms, or may *wave and discharge it altogether*, and thus make a new contract." *Wilgus vs. Whitehead*, 89 Pa., 131 (1879); citing *Emerson vs. Slater*, 22 Howard, 28; *Munroe vs. Perkins*, 9 Pick., 298; *McComb vs. McKennan*, 2 W. & S., 216.

Sec. 111. Differing Instruments and their Equivalents.

A written contract, though not under seal, granting the privilege of digging all the coal or ore on the vendor's land, is equivalent to a conveyance of the title to the coal or ore in fee. But the rights of parties to oil leases are distinguished from those of parties to coal leases by reason of the difference in the nature of the two minerals and the manner of their production. *Plummer vs. Coal & Iron Co.*, 160 Pa., 483 (1894).

This is an important case from several stand-points, which will be noticed under their respective heads, but entitled to early mention because of the above distinction, which is clearly drawn, and which should be borne in mind in the examination of the general subject.

Said WILLIAMS, J., speaking for the court :

"The difference in the nature of the two minerals and the manner of their production has resulted in considerable differences in the forms of the contracts or leases made use of. When oil is discovered in any given region, the development of the region becomes immediately necessary. The fugitive character of oil and gas, and the fact that a single well may drain a considerable territory, and bring to the surface oil, that when in place in the sand rock, was under the lands of adjoining owners, makes it important to each land-owner to test his own land as speedily as possible. Such leases generally require for this reason that operation should begin within a fixed number of days or months, and be prosecuted to a successful end or to abandonment. Coal, on the other hand, is fixed in location. The owner may mine when he pleases regardless of operations around him. Its amount and probable value can be calculated with a fair degree of business certainty. There is no necessity for haste nor moving *pari passu* with adjoining owners. The consequence is, that coal leases are for a certain fixed term, or for all the coal upon the land leased, as the case may be."

Sec. 112. Agreement Purporting to be a Lease in Effect a Sale.

A entered into a written agreement with B, "leasing" to him "all the coal beneath the surface of a certain tract of land," B covenanting to mine a minimum number of tons annually, and to pay therefor a royalty. Failure to pay for thirty days was to give the "lessor" the right of distress, and for sixty days, the right of forfeiture and re-entry. The so-called lease was made "perpetual until all the coal is mined." B covenanted to pay all taxes on coal mined. In an action by B against A to recover taxes levied on the coal in place, and paid by B under protest,

Held, that the agreement was not a lease, but an absolute sale of the coal in place, and operated as such a severance of the surface and subjacent *strata* as would render the vendee liable for all taxes levied upon the coal in place, and would relieve the vendor from liability for the same. *R. R. Co. vs. Sanderson*, 109 Pa., 583 (1885). Following *Sanderson vs. Scranton*, 105 Pa., 469 (1884).

The following coal cases, distinguished from oil in *Plummer vs. Coal & Iron Co.*, 160 Pa., 492, may, nevertheless, be noted :

The fact that an instrument is in the form of a lease is not material when the character of the transaction is apparent. *Kingsley vs. Hillside C. & I. Co.*, 144 Pa., 613 (1892). *Montooth vs. Gamble*, 123 Pa., 240 (1889).

A written contract, though not under seal, granting the privilege of digging all the coal or ore on the vendor's land is equivalent when the purchase money has been paid, to a conveyance of the coal or

ore in fee. *Fairchild vs. Furnace Co.*, 128 Pa., 485 (1889). *Armstrong vs. Caldwell*, 53 Pa., 284 (1867).

Sec. 113. Acceptance of the Terms and Conditions of an Instrument may be Established as Well by Acts as by Signing and Sealing.

Where an agreement to mine iron ore was signed and sealed by the grantor, and also by the grantee by his agent, and there was no sealed authority by the grantee to the agent nor an adoption of the seal, nor a ratification of it by a sealed instrument, it was *held* that the deed was not that of the grantee, and none of its covenants his covenants; *but* that the grant having been accepted by him, it bound him to the same extent as if he had personally signed and sealed it—only the mode of enforcing the obligation was different.

A chancellor will not enforce a contract which is one-sided; but he will interfere at the suit of a complainant who has discharged his part before the undertaking of the defendant was made, or contemporaneously with it.

The consideration for a deed of bargain and sale must be a valuable one; but it need not be expressed in the instrument if a consideration be averred, and parol evidence may be given to show what passes from the grantee. *Grove vs. Hodges*, 55 Pa., 504 (1867).

Sec. 114. Further as to Parol Evidence.

In an action upon an oil and gas lease for rentals due on account of defendant's not having commenced to drill within the time specified, when it appears that the lease sued upon was given by the lessor to

take the place of another which had never been recorded, and had become vested in defendant by various assignments, some of which had never been acknowledged, offers by defendant upon trial tending to show that the second lease was given for the purpose of confirming and perfecting defendant's title under the first lease, and not in any way contradicting or changing that title, are material and relevant and should be admitted in evidence. The court *held* that it would be the perpetration of a gross fraud upon the manifest rights of defendant to permit the second lease to destroy and defeat his title under the first. *Vanderlin vs. Hovis*, 152 Pa., 11 (1892).

Sec. 115. A Specified Price "Per Acre" for Failure to Commence and Complete Requires Payment for Each Acre Leased.

Where an instrument conveying all the oil and gas under forty acres of land contained a clause leasing one acre for a test-well, and providing that, on lessee's failure to commence and complete operations, he should pay a specified price "per acre" until completion, it was *held* that the lease required the payment of the price for the entire forty acres in case of failure to make a test. *Columbia Oil Co. vs. Blake*, 13 Ind. App., 680 (1895).

Sec. 116. Lessee's Compromise with Third Party Assailing His Right to Drill Not a Discharge of Original Agreement with Lessor.

In an action to recover a bonus under an oil and gas lease, it appeared that prior to the execution of the lease the lessor had conveyed the coal under his land to a corporation, reserving to himself in the deed the

right to drill three wells for oil and gas through the coal. After the execution of this deed, but before the execution of the lease, the lessor conveyed portions of the surface of the land to other persons, without reserving to himself the right to drill wells upon the portions so conveyed. The lessee filed an affidavit of defence in which he averred that the corporation had denied the right of the lessor and his lessees to drill for oil and gas, and that under threat of suit, defendant had agreed to pay the corporation a certain amount for each well, and that subsequently the corporation had obtained an injunction restraining the drilling of any wells upon the land covered by the oil and gas lease. *It was admitted that the first well had produced the amount of oil named in the lease as the basis for the payment of the bonus.* Held, that the affidavit of defence was insufficient to prevent judgment. *Chambers vs. Smith*, 183 Pa., 122 (1897).

Sec. 117. Of What the Courts Will Take Judicial Notice.

Said the court in *Brown vs. Spilman*, 155 U. S. R., 670 (1895):

“These (the methods for operating for oil and gas; the means of their conduct to the points of consumption; the facts of the odor and noise incident to their production, etc.,) are matters within the common experience or knowledge of all men living in those portions of the country where oil and gas are produced, and courts will take notice of whatever ought to be generally known within the limits of their jurisdiction.” Citing 1 Greenl. Ev., Sec. 6.

Sec. 118. Geography of the Country.

In *Mossman vs. Forest*, 27 Ind., 233, it was held that the courts will take judicial notice of the geography of the country, and in *Board, etc., vs. Castetter*,

7 Ind. App., 309; *Hays vs. State*, 8 Ind., 425, and *Peck vs. Sims*, 120 Ind., 345, it is said that the courts take judicial notice of the geography of the United States. In a number of other Indiana cases it has been *held* that the courts will take notice of the location of the cities and towns and in what counties they are situated. *Columbia Oil Co. vs. Blake*, *supra*.

But not of the exact limits and boundaries of the towns and cities. *Grusenmyer vs. Logansport*, 76 Ind., 549.

Nor the number of wards into which a city is divided. *Moberry vs. Jeffersonville*, 38 Ind., 198.

But, in *Carr vs. McCampbell*, 61 Ind., 97, it is *held* that it is judicially known as a part of the history of the State that "Clarke's Grant" is located in certain counties named. And, in *Cash vs. Auditor*, 7 Ind., 227, the court says that "it knows geographically that the Falls of the Ohio are local and in Clarke County." See, also, *Ohio Oil Co. vs. Kelley*, 9 Ohio C. C. R., 511 (1895).

Sec. 119. Words and Phrases—"Paying Quantities"—Usage and Custom of Trade.

An important case upon the phraseology of leases and of the evidence admissible in their construction, is that of *Collins vs. Mechling*, 1 Pa. Super. Ct. R., 594 (1896), where it was *held* that a stipulation in a lease that if oil is found in "paying quantities," the lessor is to be paid, in addition to hand money, the sum of \$600 within thirty days, is not ambiguous. "The obvious intention was," said the court through WICKHAM, J., "that if, for the period of thirty days after its completion, the well continued to produce oil

in such quantities as to make it profitable to operate it during that period, the \$600 should be demandable."

"There is a great difference between a paying well," continued the court, "*i. e.*, a well producing oil in paying quantities, and one that pays for itself. A mine for years may produce ore in paying quantities and be very profitable during that time, and yet, through a later depreciation in the value of the mineral extracted from the ore, or from accident or failure to yield enough ore, it may never repay its first cost."

It was further *held* that before a usage 'of trade or a custom can become so firmly imbedded in the law as to govern the rights of parties, it must be so certain, uniform and notorious as probably to be known to and understood by the parties entering into the contract. Citing *Weld vs. Barker*, 153 Pa., 465 (1893); *Ambler vs. Phillips*, 132 Pa., 167 (1890); *Corcoran vs. Chess*, 131 Pa., 256 (1890); *Cope vs. Dodd*, 13 Pa., 33 (1850). Cf. Clarke's *Browne on Usages and Customs*, Section 41 and cases cited. And an offer to show that a well producing oil in paying quantities has a known significance in the oil country, namely, a well that will return to the lessees the expense necessarily incurred in the drilling and operation of the lease, is defective when it fails to allege the usage as existing at the time the contract was made; where it fails to state what oil-producing country was meant, and that the usage set up was known to the plaintiffs, or that it was at least so noteworthy as to affect them with knowledge.

Further, an offer to follow proof of an alleged usage by testimony of so-called experts is properly rejected where it is proposed to show something that

experts could not by any possibility know, WICKHAM, J., saying: "We think that the opinion of the experts, unless they were also soothsayers, would savor too much of conjecture." Cf. *Bradford Oil Co. vs. Blair*, 113 Pa., 83 (1886).

Sec. 120. Expert Testimony.

While on the subject, attention may be directed to the case of *Denniston vs. Phila. Co.*, 1 Pa. Super. Ct. R., 599 (1896). The court cites approvingly *Lineoski vs. Coal Co.*, 157 Pa., 153 (1893), and makes from *Ins. Co. vs. Gruver*, 100 Pa., 266 (1882), the following extract:

"How any person can be said to be an expert in that which is not and cannot be followed as a business, or in that which must necessarily result from observation of a character so general that it must be common to every person, we cannot understand. The opinion of a witness who neither knows nor can know more about the subject-matter than the jury, and who must draw his deductions from facts already in the possession of the jury, is not admissible. * * * Were it otherwise, the opinion of jurors upon the most obvious facts might always be shaped for them upon the testimony of so-called experts, and thus a case be constantly liable to be determined, not by the opinions and judgment of the jury, but by the opinions and judgment of the witnesses."

Sec. 121. Further of "Paying Quantities."

Said the court, in *Blair vs. N. W. Ohio N. G. Co.*, 12 Ohio C. C. R., 78 (1896):

"Does this language mean that it is only so long as gas or oil is found in paying quantities in the first well drilled, and that, when it fails, the lease expires as to the entire premises? The whole premises are held by this lease for five years, and as much longer as oil or gas is found in paying quantities; not found in paying quantities in one well, but found in such quantities when proper and reasonable search is made for it."

Sec. 122. The Same—Pumping into Pipe-Line Raises Presumption Against Lessee.

In *Hankey vs. Kramp*, in the same volume, it was *held* that so long as gas from a well is piped into the pipe-line from which gas is sold to customers, the lessee is liable to pay the rent for the well under a lease providing that if gas is found in sufficient quantities to justify marketing, the lessee shall pay \$100 per annum for the gas from each well as long as it is sold therefrom.

“The election of the lessee to pump it into the line from which gas is sold, requires him to pay for it, and raises a presumption that the well is producing gas in paying quantities, even if the gas actually produced from that well was not more than enough to operate the wells on the land, and, if used for that purpose, the lessee would not have had to pay for it.”

But the presumption, upon proper evidence, could doubtless be rebutted.

Sec. 123. “Due Diligence.”

An oil lease reserving royalty provided that lessee should commence drilling a well within a specified time and prosecute said drilling with due diligence to success or abandonment, and should oil or gas not be pumped or excavated in paying quantities on or before June 27, 1886, then the lease to be null and void. A subsequent clause made the violation of any stipulation of the lease a cause of forfeiture.

Held, that the lessee was not justified in drawing the casing and leaving the premises from December to April, on account of cold weather. The provision respecting the production of oil or gas on or before the date mentioned did not give lessee a discretion to suspend operations indefinitely, as he claimed, after

drilling the well, *provided he effected the production by the date named*. A suspension for the period named worked a forfeiture. *Kennedy vs. Crawford*, 138 Pa., 561 (1891).

Sec. 124. "Success or Abandonment."

To prosecute the drilling of a well to success or abandonment means that "there must be a product obtained, capable of division between the parties in the proportions mentioned in the lease, and unless this is done, the drilling is not a success." *Ibid*.

Sec. 125. "Commencement of Operations."

In *Fleming Oil & Gas Co. vs. South Penn Oil Co.*, 37 W. Va., 645 (1893), ENGLISH, *President*, speaking for the court, said :

Can it be said that, in order to commence operations for a test-well, the drill must actually commence to penetrate the rock ? I do not so understand the meaning of the expression construed in connection with the facts presented by the record. In many places, in order to sink a well it is necessary that some sort of wooden or metallic casing be provided for the purpose of excluding the soil and clay which must be passed through before the rock is reached ; and it would hardly be contended that the purchase and provision of the necessary material for such casing or cribbing was not an important step in putting down the well.

"Webster defines the word 'operation' as 'an effect brought about in connection with a definite plan' ; and, in giving the interpretation ordinarily ascribed to the words 'to commence operations'—that is, applying to the words their common acceptance—I would understand the expression to mean *the performance of some act which has a tendency to produce an intended result*. For instance, if a man had determined to erect a brick house, and, in pursuance of that design, had quarried the rock on his own land to be used in the cellar walls and foundation, and had burned a kiln of brick on the same premises for the purpose of constructing

the walls and chimneys, it surely could not be said that he had not commenced operations, although the roads might then be in such a condition as to prevent him from hauling the stone and brick to the place he had selected for its location.

"Another familiar instance that may serve the purpose of illustration is the erection of locks and dams for the purpose of improving navigation by increasing the depth of the water. * * * When the location of the lock has been selected and stone has been quarried and prepared, although it has not been hauled to the location and no excavations have been made to receive it, we would not be warranted in saying that operations had not been commenced for the construction of the lock.

"And again, where a building has been destroyed by fire, how frequently do we hear it remarked that the owner commenced operations at once for the construction of another by clearing away the *débris* and contracting for the material with which to rebuild the structure?

"The terms of the covenant contained in said lease must be regarded as having been complied with, no matter how slight may have been the commencement of any portion of the work which was a necessary and indispensable part of the work required in putting down the test-well."

It is possible that the portion of the foregoing in italics is somewhat broadly stated, and is susceptible of abuse; but when viewed in the light of the circumstances of the case, and of the remainder of the opinion, it must impress the reader as altogether just

Sec. 126. "Retained."

An oil lease covering several tracts of land provided, that in the event that any piece failed to yield the lessor a certain royalty, the lessee should pay a certain rental upon each piece "retained." *Held*, that the word retained referred to the right to operate, and this right continued until lessee made a formal surrender of lease. *R. R. Co. vs. Egbert*, 152 Pa., 53 (1892).

Sec. 127. "Vicinity."

Plaintiff offered to drill an oil well upon any one of defendant's several leases that might be selected. He further proposed as follows: "If you decide to drill any more wells upon said leases or in the vicinity, * * * I am to have the contract." At the end of the proposition was written "Accepted, contract to be drawn in accordance with the above proposition or bid"; and the following words were then added by the president of the defendant company: "This is about right, and will be satisfactory to the Pittsburgh Company." Without any contract being executed, plaintiff sunk the first well, which proved a dry one, and defendant abandoned the enterprise of sinking any other wells on about one thousand acres of *contiguous* lands which they had under lease. They, however, sank wells about two miles distant from the territory thus abandoned.

Held, that the sinking of the well by defendants upon this territory was not in the vicinity of that contemplated by the proposition, and was therefore not a breach. The use of the word "vicinity" being a relative term, used differently according to its subject, cannot operate to change the duty of the court in the interpretation of it, and transfer that duty to the jury. *Sparks vs. Pittsburgh Co.*, 159 Pa., 295 (1893).

Sec. 128. Termination.

A lease for two years and as much longer as oil or gas is found in paying quantities, or the rental paid thereon, contained a covenant by the lessee to complete a well within ninety days or pay an annual rental for further delay. *Held*, that the failure of the lessee

Sec. 131. Formal Re-Delivery not Necessary. Tender of Rent After Rescission Will Not Revive Lessee's Rights.

An oil and gas lease gave lessor no right to rescind, but provided that lessees "shall have the right at any time to surrender up this lease, and be released from all money due and conditions unfulfilled." The lessees did not absolutely covenant to develop the land, but only agreed to bore or pay \$100 per month if they did not drill. Lessees never entered into possession of the land. The evidence tended to show that after two monthly payments had been made, two of the three lessees asked the lessor for time on the third, and that it was agreed between them that the time should be extended three weeks, and if the money was not then paid, they would surrender the lease. At the end of three weeks the money was not paid, and one of the lessees told the lessor that he should go on and lease to any one, and that the lease would be returned. The lease was never formally re-delivered. Sixteen months afterwards, the lessor leased the premises to other parties. *Held*, that the evidence was sufficient to establish a rescission of the lease. *Hooks vs. Forst*, 165 Pa., 238 (1895).

In such a case, a tender of the monthly rental after the rescission had been consummated could not revive the lessees' rights and privileges.

Per DEAN, J.:

"Any course of conduct of the parties clearly evincing an intention to rescind a contract such as this, works a rescission of it."

Sec. 132. Surrender to the Solicitor of a Company not Sufficient Without More.

An offer to show that the solicitor of a company had control of its legal business is not sufficient proof of his authority to accept surrender of a lease, or abandonment of the premises.

Sec. 133. Rescission for Fraud.

It will be well to note here certain decisions from leading courts upon the question of the rescission of contracts for the sale of mining properties upon the ground that they were procured by fraudulent representations on the part of the owner as to their probable productiveness or actual yield. It will be seen that the decisions involve the element of purchase outright of the properties, but the principle would seem to be the same, *mutatis mutandis*, in the case of a lease whereby a lessee, assuming incautiously certain obligations as to development and rent, finds later that they arise to plague him. For that reason they are inserted under this title.

In order to rescind a contract for the purchase of real estate on the ground of fraudulent representation by the seller, it must be established by clear and decisive proof :

1. That the alleged representation was made in regard to a material fact.
2. That it was false.
3. That the maker knew it was not true.
4. That he made it in order to have it acted upon by the other party ; and,
5. That it was so acted upon by the other party to his damage and in ignorance of its falsity, and with a reasonable belief that it was true.

Statements made by the seller of a speculative property like a mine, at the time of the contract of sale, concerning his opinion or judgment as to the probable amount of mineral which it contains, or as to the character of the bottom of the ore chamber, or as to the value of the mine, if they turn out to be untrue, are not necessarily such fraudulent representations as will authorize a court of equity to rescind the contract of sale.

The fact that a representation made by a seller was false raises no presumption that he knew that it was false.

When the purchaser of a property undertakes to make investigations of his own respecting it before concluding the contract of purchase, and the vendor does nothing to prevent his investigation from being as full as he chooses, the purchaser cannot afterwards allege that the vendor made representations respecting the subject investigated which were false. *Development Co. vs. Silva*, 125 U. S. R., 247 (1888); citing *Gordon vs. Butler*, *infra*; *Mooney vs. Miller*, 102 Mass., 217; *Barnett vs. Stanton*, 2 Ala., 181; *McDonald vs. Trafton*, 15 Me., 225; *Tuck vs. Downing*, 76 Ill., 71.

In *Holbrook vs. Connor*, 60 Maine, 578, the vendor and his agent represented, among other things, that lands sold by them contained large deposits of oil and were of great value for the purpose of digging, boring for and manufacturing it; and upon the representations the purchasers acted. The evidence tended to show that the representations were false and fraudulent, and the plaintiff obtained a verdict. But the Supreme Court set it aside. It appeared that the land had not been tested, and it was unknown to both parties whether it was valuable as oil land, except so far as might be inferred from the production of wells on neighboring lands, and a single well upon the land in question. *Held*, that under these circumstances the representation was to be regarded as a matter of opinion, and would not support the action.

In *Gordon vs. Butler*, 105 U. S. R., 553 (1881), the Supreme Court refused relief to a mortgagee who had loaned money on sandstone land, the borrower furnishing certificates of two other persons that, in their best judgment, the land was worth more than one hundred and fifty per cent., the amount of the loan. Upon a sale under a decree of foreclosure, the land brought less than one-sixth of the amount loaned. The mortgagee thereupon sued the borrower and the other parties, charging that they had conspired to defraud him by a false and fraudulent certificate. It was *held* that the action would not lie, the defendants not being liable for an expression of opinion, however fallacious, in regard to property, the value of which depends upon contingencies that may never occur or developments that may never be made.

Per FIELD, J.:

“The determination of its truth or falsity, until the contingency occurs or becomes impossible, would lead the court into investigations for which they have no fixed rules to guide their own judgments or to instruct juries.”

But, in the case of *Mudsill Min. Co. vs. Watrous*, U. S. Cir. Ct. Ap., 6th Cir., 61 Fed. Rep., 163 (1894); S. C., 9 C. C. A., 415, the court, in an elaborate opinion, reviewing the authorities in point, says: “But this rule, that a mere expression of opinion will not constitute fraud, must not be pushed beyond the reason for the rule,” and, upon a bill for the rescission of the purchase of a silver mine on the ground of fraud, alleging that defendant represented that the ore therein contained a certain average of pure silver, making it very valuable, whereas in fact the average was so low as to be worthless, and that defendant had

"salted" the samples which complainant took from the mine, and upon the faith of whose analysis the purchase was made, by fraudulently mixing native silver therewith, *held*, that where the latter allegation is sustained, defendant cannot shelter himself behind the plea that his representations were mere expressions of opinion as to the value of the mine.

Per LURTON, *Cir. J.* :

"If a false statement is to be given immunity because it is mere 'puffing' or 'trade talk,' and only the expression of an opinion, it is because the party to whom the opinion is addressed has no right to rely upon the mere expression of an opinion, and is assumed to have the ability and opportunity of forming his own opinion and coming to an independent judgment." Citing Pom. Eq. Jur., Sec. 878

"If, therefore, the party making false statements as to a matter conjectural in its character, and therefore relating to a matter of opinion, actively intervene to prevent investigation and the discovery of the truth, and such intervention be effective in the concealment of the facts and in the deception of the buyer, a clear case of operative fraud is made out. In every such case immunity will not be extended to false expressions of opinion, upon the ground of 'puffing' or 'trade talk,' if it appear that the vendor has, by his conduct, prevented investigation, and induced reliance upon the statements of the seller. In such a case the subsequent conduct of the seller in actively preventing the buyer from the formation of an independent opinion, so connects itself with the original misrepresentation as to become part and parcel of the false statement, and amounts in law to the false affirmation of a fact. A false representation may, and most often does, consist in language alone, expressed or written; but it may also consist in conduct alone, or external acts. Whenever the purpose is to induce belief in the existence of a fact which does not exist, every word and act intended to produce conviction and induce action becomes a misrepresentation if, through their instrumentality, the party upon whom they are practiced is induced to act."

Sec. 134. Defendant Must be Placed in *Statu Quo*.

"It is too well settled to justify citations, that before an agreement can be rescinded the plaintiff must have done all in his power, and with promptness, to place the defendant *in statu quo*." *Reeves vs. Corning*, 51 Fed. R., 782 (1892).

Nevertheless, in a suit to cancel conveyances of an interest in a mine, plaintiffs need not tender a return of the purchase money, where it appears that, in case of a decree in their favor, defendants would be required to account for past profits far in excess of the purchase price, for such price can be credited to them in the accounting, and their interests thus fully protected. *Billings vs. Mining & Smelting Co.*, Cir. Ct. Ap., 8th Cir., 51 Fed. Rep., 338 (1892); citing *Thackarah vs. Haas*, 119 U. S. R., 499.

And, in *Grass vs. Scott Mfg. Co.*, 48 Fed. R., 39 (1891), upon a bill to compel the reconveyance to complainant of mining land formerly owned by him, NEWMAN, J., says :

"I do not understand the rule to be that tender back of the purchase money in a case like this is absolutely essential for maintaining either a bill in equity or proceeding at law. It is a matter that is controlled very largely by the circumstances of the case ; and I would be unwilling in this case to turn the complainant out of court for a lack of a formal tender, when all the rights he may have in that respect can be fully protected and his claim for re-payment allowed in ample measure."

ESTOPPEL.**Sec. 135. Questioning Landlord's Title.**

The case of *Kunkle vs. People's Nat. Gas Co.*, 165 Pa., 133 (1895), heretofore referred to on other points, is one of several in the Pennsylvania Reports discouraging to lessees attempting to evade compliance with their express contracts.

An owner of land had executed an oil and gas lease for the term of ten years. The consideration was a portion of the oil and a money rental for each paying well. The lessee covenanted to begin operations within six months from the execution of the lease, and to complete one well or pay lessor \$500, further agreeing to pay \$130 as rental until the completion of the first well. Lessee did nothing in the way of development during the first six months. Lessor demanded the rent and royalty then due, \$630. Lessor *then* disclosed the fact that his wife had an interest in the land. Upon lessee's demand that the wife should join in the lease, lessor assented, and it was agreed that he should send an agent to secure his wife's signature. This, however, was never done. It appeared that the wife was present at the negotiations which led to the lease, and that she did not then or afterwards make any objection to it. The lessee retained possession of the lease, and did not surrender it until after the suit was brought for the rent, when it was unconditionally surrendered. *Held*, that the lessee was liable for the rent and royalty for the first six months.

Per DEAN, J. :

"Not a single authority cited by appellant rules the case in its favor on such a state of facts. All of them are cases where the lessee had been deterred from taking possession by fear of the adverse claim, or where he had been induced to accept the lease by fraud or trick practiced by the lessor. Here the lessee had that sort of possession under its contracts which it was entitled to. There was not a semblance of fraud perpetrated or intended. The learned judge of the court below rightly held that, as to rent and royalty payable at the expiration of the first six months, there was no sufficient defence in law or equity."

Sec. 136. The Same.

A lessee of an oil lease who takes a second lease of the same premises from a person claiming adversely to the original lessor, cannot refuse to pay the rent under the second lease on the ground that the lessor in the first lease had the better title to the land. *Hamilton vs. Pittock*, 158 Pa., 457 (1893).

Sec. 137. The Law Cannot Relieve Against Misunderstanding of the Meaning of an Instrument in the Absence of Accident, Mutual Mistake or Fraud.

An important ruling was made in the case of *Cochran vs. Pew*, 159 Pa., 184 (1893), cited elsewhere upon other points. An affidavit of defence in an action upon an oil lease averred that "there was inserted in the lease a clause in the words following," etc., and that defendants would not have signed except for the alleged agreement, "and the belief on the part of the defendant that it was substantially expressed in the writing." *Held*, insufficient.

This is not an averment of a contemporaneous, parol agreement, which ought to modify the written instrument, but of an agreement put into writing which the defendant construed in a certain way.

"It does not set up any accident or mutual mistake, but that the parties used language which the defendants thought to mean what the law says it does not mean. This is not the kind of mistake which affords a basis for reformation of the instrument or for relief from its terms as the parties wrote them."

And to the same general effect is the ruling upon similar facts in *Liggett vs. Shira*, *Ibid.*, 350. The doctrine, in a word, is that the courts cannot correct mistaken constructions of instruments.

Sec. 138.

An offer to prove an explanation by an agent of the lessee of the legal construction of a lease, there being no allegation of fraud, accident or mistake in the execution of the lease, will be rejected. *Hall vs. Phillips*, 164 Pa., 494.

Sec. 139. Tenant Who Has Enjoyed Lease Cannot Assert Imperfect Execution.

A lease by a corporation, although executed in a name different from its true corporate name, may be enforced by either of the parties, and the tenant accepting the lease and occupying the premises is estopped to deny the power of the corporation to contract in its assumed name. *Marmet Co. vs. Archibald*, 37 W. Va., 778 (1893).

Even executory agreements will bind both parties, though signed and sealed by one only, and only sealed but not signed by the other, though the agreements contain the words "Witness the hands and seals of the parties." *Grove vs. Hodges*, 55 Pa., 504 (1867).

Sec. 140. Defective Acknowledgment.

The fact that an oil and gas lease made by a married woman, in 1886, with all the terms of which on her part she had fully complied, was not acknowledged in such manner as to be binding upon her, affords no defence to an action to recover rentals from the lessee brought by her after the lease had expired by its own limitation. *Agarter vs. Vandergrift*, 130 Pa., 593 (1890). See, also, to the same general effect, *Kunkle vs. Gas Co.*, *supra*.

Sec 141. The Same.

Where the certificate of acknowledgment of an oil and gas lease omitted to state that the contents of the instrument were made known to the wife upon her separate examination, *held*, that under the Pennsylvania act of May 25, 1878, P. L., 149, equity will reform the acknowledgment. The act excludes from its operation only cases in which actions were commenced before its passage. *Mfrs. Nat. Gas Co. vs. Douglass*, 130 Pa., 283 (1889).

Sec. 142. Defective Execution by Corporation.

Where a mining lease executed in the name of a corporation by its superintendent was turned over to defendant as successor to the ownership of the mine, and defendant, with knowledge as to how the lease was executed, allowed lessee to work the mine for several months and received the lessor's share of the proceeds, defendant will be deemed to have ratified the lease and will not be allowed to question its validity because not executed under seal. *Bicknell vs. Austin Mining Co.*, 62 Fed. Rep., 432 (1894).

**PENNSYLVANIA LEGISLATION AUTHORIZING
MORTGAGES OF LEASEHOLDS.****Sec. 143.**

The act of April 27, 1855 (P. L. 369), provides that

“ It is hereby declared to be lawful for every lessee for term of years of any colliery, mining land, manufactory, or other premises, to mortgage his or her lease or term in the demised premises, with all buildings, fixtures and machinery thereon, to the lessee belong and thereunto appurtenant, with the same effect as to the lessee's interest

and title, as in the case of the mortgaging of a freehold interest and title as to lien, notice, evidence and priority of payment: *Provided*, That the mortgage be in like manner acknowledged and placed of record in the proper county, together with the lease, and that such mortgage shall in no wise interfere with the landlord's rights, priority or remedy for rent, and such mortgages may be sued out as in other cases."

The act of April 3, 1868 (P. L., 57, Sec. 1), provides that

"In all cases of mortgages upon leasehold estates, the mortgagees shall have the same remedies for the collection thereof which mortgagees of real estate have under the laws of this commonwealth."

A further provision validates all proceedings theretofore instituted for the recovery of moneys secured by mortgages on leasehold estates.

The act of May 13, 1876 (P. L., 160), provides that

"Whenever a lease or term of years shall have heretofore been or shall hereafter be mortgaged under the act of April 27, 1855,"
* * * "if the lease shall be recorded in the deed books of the proper county before the execution of the mortgage or shall thus be recorded at the time of recording the mortgage, such recording shall be deemed a sufficient compliance with the requirements of the act with reference to recording such lease: *Provided always*, That full and distinct reference be made in said mortgage to the book and page where the said lease is recorded."

Sec. 144. Judicial Constructions of this Legislation.

In *Gill vs. Weston* (No. 2,) 110 Pa., 312 (1885), it was *held*:

1. That the act of 1855 applied to and authorized a mortgage of a leasehold in oil land, although the act was passed before petroleum was discovered.

2. That under said act personal property embraced in a mortgage of a leasehold cannot be removed by the lessee and mortgagor, and if removed by him, may be followed by the mortgagee wherever he finds it, and this notwithstanding the mortgage is not due.

3. In such case trover is the proper remedy ; a special property and a right to immediate possession being all that are necessary to maintain trover.

4. That under a mortgage of a leasehold under said act, including "all machinery and fixtures thereon—one boiler, one engine, two tanks, etc.—and all and singular the appurtenances thereunto belonging," the description included a leather belting, and it was therefore competent to prove by oral evidence that such belting was actually on the leasehold premises when the mortgage was executed, and was embraced therein.

In *Gill vs. Weston* (No. 1), *Id.*, 305, it was held :

1. That where a mortgage of a leasehold, executed November 29, 1882, was recorded in one of the mortgage books of Warren County, on December 15, 1882, the lease itself bearing date October 18, 1882, and being recorded at the same time and in immediate connection with the mortgage, this was a recording of the mortgage "in the proper county together with the lease."

Following *Glading vs. Frick*, 88 Pa., 460 (1879).

2. That the acts of April 27, 1855, and of May 13, 1876, are *in pari materia*, and should be construed together, and that the latter act was intended to apply only to cases where, by reason of the lease having

been previously recorded or other similar cause, the provision of the former act as to recording the mortgage and the lease together cannot be literally complied with.

3. That the lien of a leasehold mortgage, duly acknowledged and recorded in accordance with the act of April 27, 1855, is not divested by a sheriff's sale upon a judgment subsequently recovered against the mortgagor. Such a mortgage is regulated by the same rules as govern the mortgage of a freehold interest.

See, also, *Sturtevant's Appeal*, 34 Pa., 149 (1859).

But the act of April 27, 1855, and its supplement of April 3, 1868, embrace no lease that vests a freehold. *R. R. Co. vs. Sanderson*, 109 Pa., 503 (1885).

Sec. 145. The Same.

The words "or other premises" in the acts of 1855 and 1876 are not to be restricted to lots of like nature as colliery, mining or manufacturing leaseholds; and a leasehold interest in a city lot for a term of years, the lessee paying a yearly rent and being required to erect a building thereon, is within the operation of the acts. *Hilton's Appeal*, 116 Pa., 351 (1887).

Per STERRETT, J.:

"Any other construction would exclude from the operation of the act valuable leaseholds, which were, no doubt, intended to be embraced, and thus fail to effectuate the general purposes expressed in the title of the act and recognized in subsequent legislation on the same subject."

Under said acts, on the failure of the mortgagee of a leasehold either to record the lease with his mortgage or to cause full and distinct reference to be made in the mortgage to the book and page where the lease is recorded, the mortgage is without lien. *Ibid.*

Leasehold mortgages are wholly dependent upon the acts above mentioned for their validity as liens. *Ibid.*

Recording the mortgage with a copy of the lease and referring to the lease as recorded with a former mortgage is a substantial compliance with the act *Ladley vs. Creighton*, 74 Pa., 490 (1872).

ADDENDUM.

The doctrine of *Wettengel vs. Gormley*, 160 Pa., 559 (*ante*, Sec. 96), was re-affirmed in *Wettengel vs. Gormley*, 184 Pa., 354 (1898):

Per WILLIAMS, J.:

"The cleaver of the testator applied by the terms of his will for the division of the lands between his children made a clean-cut separation of the shares of each down till the leasehold was encountered. There its descent was arrested until the term created by the lease expires. When that occurs, its downward course will be instantly resumed, and the severance of the freehold and its minerals will be complete. The further reflection bestowed upon this question has in no sense shaken our confidence in *Wettengel vs. Gormley*, 160 Pa., 559. We adhere to it."

There was, however, a new question in the last case, namely, whether the injury done to any one of the devisees upon whose surface the wells might happen to be should not be borne as the benefit was shared—in equal proportions by the three. It was decided in the affirmative, and the amount of three years' loss upon rentals was deducted from the royalties before division.

CHAPTER VI.

ASSIGNMENTS.

Sec. 146. Covenants Running with the Land.

A covenant is said to run with the land when either the liability to perform it or the right to take advantage of it, passes to the assignee of that land.

"If lessee for years covenants to repair the houses during the term, it shall bind all others as a thing which is appurtenant and goeth with the land, in whose hands soever the term shall come, as well as those who come to it by act in law as by the act of the party, for all is one having regard to the lessor. And if the law should not be such, just prejudice might accrue to him; and reason requires that those who shall take benefit of such covenant when the lessor makes it with the lessee, should, on the other side, be bound by the like covenant when the lessee makes it with the lessor." *Spencer's Case*, 5 Coke, 16; S. C., 1 Sm., L. C. (9th Am. Ed.), 174; and cases cited in the instructive note, p. 180.

And the case distinguishes sharply between covenants which extend to a thing *in esse*, parcel of the demise and *quodammodo* annexed and appurtenant to the thing demised, which shall go with the land and shall bind the assignee, although he be not bound by express words, and covenants which (a) extend to a thing which is not in being at the time of the demise made, and (b) contemplate a thing to be

done which is merely collateral to the land, and does not touch or concern the thing demised in any sort—in which latter cases the assignee shall not be charged,

Sec. 147. Liability Arises Out of Privity of Estate, Not of Contract.

In *Negley vs. Morgan*, 46 Pa., 281 (1863), it was said :

“Undoubtedly an assignee of a term is liable for such portion of the rent reserved as falls due during the continuance of his connection with the demised premises. He is liable at all only by reason of his privity of estate, and, therefore, liable for no more than such breaches of the covenants running with the land as occur while the privity continues. Hence, it is said, his assignment of the term, even though to a pauper, terminates his liability for any subsequent breaches, for it breaks the privity of estate.

“But to work such an effect, the privity must be absolutely destroyed. The assignee, having entered under an assignment and thus come into privity, that privity continues as long as his beneficial enjoyment of the demised property or right to it remains.”

To the same effect is *Borland's Appeal*, 66 Pa., 470 (1870). See, also, *Drake vs. Lacoe*, 157 Pa., 17 (1893).

Sec. 148. Covenant to Produce Oil Held to Run With the Land and Bind Assignee.

In *Bradford Oil Co. vs. Blair*, 113 Pa., 83 (1886), A leased his farm to B to explore for and produce oil, at a royalty of one-eighth the production. The lease contained the following covenant :

“To continue with due diligence and without delay, to prosecute the business to success or abandonment ; and, if successful, to prosecute the same without interruption for the common benefit of the parties.”

B assigned an interest in the lease to C and D, and they with B assigned it to E. Two wells were bored on the farm, both of which were producing wells. E then refused to bore any other wells. In an action of covenant brought by A against E, *held*, that the covenant was not the personal one of B, but one which ran with the land, and, therefore, bound E.

Sec. 149.

But, in *Washington Natural Gas Co. vs. Johnson*, 123 Pa., 576 (1889), the court ruled that an assignee of an oil and gas lease is not liable to the lessor, upon a covenant of the lease, in terms extending to the assigns, to drill a well upon the demised premises, when the time for performance had elapsed before the assignee acquired title under the assignment; but that the *lessee's liability continues after his assignment of the lease*, growing as it does out of privity of contract. The case is an important one. The decision went off upon the question of privity, and the distinction is so nice as to call for the insertion of a portion of the opinion of the court upon the point.

Said WILLIAMS, J. (pp. 591-593):

“Turning then to the question raised by the points, we find the facts to be as assumed therein, and the liability of the gas company to depend upon the extent to which the covenants of Guffey & Co. ran with the land. That they continued liable, notwithstanding their assignment to Robbins, is very clear. The covenant was their own, and their privity of contract with their lessors continued, notwithstanding their assignment of the lease. Their assignee, Robbins, who was in possession when the time for performance arrived, was also liable, because of the privity of estate which arose upon his acceptance of the assignment. Acquiring the leasehold estate by an assignment of the lease, he is fixed with

notice of its covenants, and he takes the estate of his assignor *cum onere*. But as his liability grows out of privity of estate, it ceases when the privity ceases. If he had assigned before the time for performance, his liability would have ceased with his title, and liability would have attached to his assignee by reason of privity of estate, and so on, *toties quoties*. Each successive assignee would be liable for covenants maturing while the title was held by him because of privity of estate; but he would not be liable for those previously broken, or subsequently maturing, because of the absence of any contract relations with the lessor. While he holds the estate and enjoys its benefits, he bears its burdens by an assignment, even though, as is said in some of the cases, his assignment be to a beggar. *Negley vs. Morgan*, 46 Pa., 281; *Borland's Appeal*, 66 Pa., 470. * * *

"The case of the *Bradford Oil Co. vs. Blair*, 113 Pa., 83, has been cited as sustaining a contrary doctrine, but an examination of it will show that it is clearly distinguishable from this case.

"The covenant which it was sought to enforce in that case was not for the completion of successive wells at successive dates, but it was for the commencement of the work of developing Blair's farm at a time certain, and to 'continue with due diligence and without delay to prosecute the business to success or abandonment, and, if successful, to prosecute the same without interruption.' Two wells were completed, and were successful oil wells. The assignee of the lease owned adjoining lands upon which it was operating, and it stopped work on the Blair farm. The action rested on the breach of the covenant to prosecute the business of producing oil from the land of the lessor with due diligence and 'without interruption.' The obligation of a covenant to prosecute the business of developing the land of the lessor without delay and without interruption, is a continuing one. The breach for which the Bradford Oil Co. was held liable was not that of some previous holder of the title, but its owner."

In *Goss vs. Brick Co.*, 4 Pa. Super. Ct., 167 (1897), the doctrine was re-affirmed. The following is one of its logical applications:

An assignee of a leasehold estate (the syllabus inaccurately says, "a lessee of a leasehold estate"—

the vital point) unfettered as to assignment, having assigned to an insolvent, evidence is inadmissible as to his knowledge of such insolvency and intent in assigning, for the purpose of showing that the assignment is fraudulent and void as against the lessor seeking to recover for royalties reserved in the lease.

The court recognized the possibility of the abuse of the doctrine from an equitable standpoint, saying :

“The danger of possible injury from this source could have been avoided by providing for such a contingency in the writing itself.”

But, with the present methods of oil and gas operations, and the general conformity of the leases to one established type of long standing, it is believed that an attempt to inaugurate a custom of inserting a covenant not to assign without leave would not be successful. The lease is to the lessee his visible evidence of title which he finds necessary in the quick closing of an advantageous offer of purchase. Should he be widely separated by time or distance from his lessor and unable to obtain his “leave,” he loses his opportunity. In the light of these and other considerations, which suggest themselves to those familiar with the oil business, it is submitted, in the same spirit that has caused the courts, while declining to change their rulings upon certain points in the same business, to request legislative interference, that statutory permission might at least be given to the introduction of evidence of brazen and admittedly fraudulent assignments to “beggar assignees,” to a prisoner or to a person leaving the state.

Dumpro's Case, 4 Coke, 119 (1 Smith L. C., 119), related to covenants in leases and assignments ; and concerning it Sir JAMES MANSFIELD, C. J., said : “The

profession have always wondered at *Dumpor's Case*, but it has been law so many centuries that we cannot now reverse it." And Lord ELDON: "Though *Dumpor's Case* has always struck me as extraordinary, it is the law of the land." At length parliament acted and the rule established by the case ceased to be the law.

Sec. 150. Ohio—Indiana.

In *Woodland Oil Co. vs. Crawford*, 55 Ohio, 161 (1896); S. C., 34 L. R. A., 62, lessee assigned the lease, and, in such assignment, stipulated that the assignee should have and hold the lease under the terms thereof, and under and subject to the rents and covenants therein reserved and contained. *Held*, that thereby the assignee stepped into the shoes of the lessee and assumed his obligations and became liable for the rentals due under the lease.

To the same effect. *Breckenridge vs. Parrott*, 15 Ind. App., 411 (1896); S. C., 44 N. E., 66.

Sec. 151.

See, also, *Fennell vs. Guffey*, 139 Pa., 341 (1891); *Watson Coal Co. vs. Castel*, 73 Ind., 296; *McDowell vs. Hendrix, Exr.*, 67 Ind., 513; *Gordon vs. George*, 12 Ind., 488; *Stewart vs. Ry. Co.*, 102 N. Y., 607.

Sec. 152.

In *McBee vs. Sampson*, 66 Fed. Rep., 416 (1895), the leading authorities upon the subject are reviewed; among others, *Childs vs. Clark*, 49 Am. Dec., 164; *Johnson vs. Sherman*, 76 Am. Dec., 481, and *Onslow*

vs. *Corrie*, 2 Madd., 340, all supporting the doctrine that the assignee is responsible for the rent only so long as he remains in possession of the property. Says the court, after citing the authorities in point :

“ A *lessee* remains liable on his express obligation, notwithstanding he may have assigned his lease. *Wall vs. Hinds*, 4 Gray, 256 ; *Smith vs. Harrison*, 42 Ohio St., 180. And the lessor may sue at his election either the lessee or the assignee, or may pursue this remedy against both at the same time, though, of course, with but one satisfaction. In such cases, the liability of the original lessee depends upon privity of contract and continues during the whole term, while the liability of the assignee depends upon privity of estate, created by the assignment and continues only during the time he holds legal title to the leasehold estate during the assignment. Tayl. L. & T., Sec. 452 ; 1 Nashv. R. P., 326 ; *Thursby vs. Plant*, 1 Saund., 241, b, note 6.” *Eaton vs. Jaques*, 2 Doug., 463.

The court (SIMONTON, *Cir. J.*.) then remarks :

“ Equity, however, gives relief to a landlord for his rent in cases of assignment : First, where the assignment is merely colorable and fictitious, the possession remaining with the assignor ; or, secondly, though there be a real assignment, yet it has been made for the purpose of depriving the landlord of his legal remedies for rent due or breaches of covenant incurred previous to the assignment.”

This, however, is only *obiter*, as the court did not grant any such relief in the case.

Sec. 153. Drilling Oil Well Through Coal Vein—Continuing Liability of Assignors.

Defendants, the owners of an oil and gas lease, drove a well through a vein of coal owned by a coal company, which filed a bill in equity to restrain them from further operations. Subsequently defendants and the coal company settled their differences in a

writing, by which the coal company agreed to no longer obstruct the drilling of oil and gas wells, and defendants agreed to pay \$500 for the first well and \$500 for each additional well to be drilled thereafter. Defendants subsequently assigned their lease and other wells were drilled by their successors in title. *Held*, that defendants were liable in the sum of \$500 for each well drilled after their assignment. And the fact that plaintiff failed to demand from the assignee the sum stipulated for each well, when begun, did not work a forfeiture of its rights under the contract, since the time of payment, being for its benefit, might be waived. *Coal Co. vs. Greenlee*, 164 Pa., 549 (1894).

Per STERRETT, C. J.:

"The assignment upon which defendants rely is purely *ex parte* and is 'a new way of paying old debts' which no court of justice can recognize." See *Sanders vs. Sharp*, 153 Pa., 562 (1893); *post*, Chapter VIII, "Obligation of Lessee."

Sec. 154. Forfeiture—Assignee Put upon Inquiry.

Where a lease provides for forfeiture in certain cases, the assignee is bound at his peril to ascertain whether or not it has been forfeited. *Nat. Gas Co. vs. Phil'a. Co.*, 158 Pa., 317 (1893).

Sec. 155. Sale under Execution Equivalent to Assignment.

Where a term of years is sold by a sheriff under execution, the sale operates and takes effect as an assignment at law, and a purchaser at such sale takes the estate liable to such covenants of the lessee as may have attached to the property demised, and, as

he assumes these liabilities of the lessee, he also takes all the interests of the assignor, whether in possession or expectancy. *Simons vs. Van Ingen*, 86 Pa., 330 (1878).

Sec. 156. Purchaser of Oil Lease at Sheriff's Sale must Inquire as to Unfulfilled Covenants.

A purchaser of an oil lease at a sheriff's sale acquires no greater interest or estate than that actually held by the lessee, and he takes subject to all the covenants and conditions contained in the lease. He is, therefore, bound to inquire, and, failing to do so, is fixed with notice of all that inquiry would have disclosed. *Aderhold vs. Oil Well Sup. Co.*, 158 Pa., 401 (1893).

Sec. 157. Liable Also for Taxes on Improvements.

A purchaser at a sheriff's sale of the unexpired term of a coal-mining lease takes the lessee's place under the lease, standing upon no higher plane in any respect, and like the tenant, is liable for all taxes on improvements placed by himself on the land. *Re Huddell*, U. S. D. C., E. D. Pa., 16 Fed. R., 373 (1883).

Sec. 158. Liability of Purchaser of Leasehold, with Beneficial Ownership, when Assignment made to Third Party.

A leasehold of slate quarries was exposed to public sale, with other property, and purchased by defendant. Afterwards, a deed for the property thus purchased was, at his request, made to a third party, who subsequently conveyed to defendant all the property *except the lease*. The plaintiffs, claiming that

defendant was in fact the assignee and beneficial owner of the term, brought suit to recover rent which accrued since the date of the public sale. *Held*, that defendant was liable.

Per STERRETT, J.:

"There is no merit in the position that the lease was not assigned to the defendant. If it was included in his purchase, and at his request, the deed was made to Felton, not for the purpose of investing the title absolutely to him, but to be held in trust to defendant, the beneficial ownership was in the latter. This was a question of fact for the jury." *Morgan vs. Yard*, Sup. Ct. Pa., 13 Pitts. L. J., 178 (1882); S. C., 12 W. N. C., 449.

Sec. 159. Parol Agreement for Forfeiture Yields to an Assignment for Valuable Consideration without Notice.

Though a parol agreement for a forfeiture of a prior lease for failure to commence the well, or pay a rental, be entered into, yet an assignee of the lease, for valuable consideration, and without notice of the agreement, would obtain and could convey a good title, even to a vendee who had actual notice. *Thompson vs. Christie*, 138 Pa., 230 (1890).

Sec. 160.

An assignee of the undivided interest of one partner in the usual oil and gas lease takes subject to partnership debts. *Chamberlin vs. Dow*, Sup. Ct. Pa., 16 W. N. C., 532 (1884).

Sec. 161. Payment of Rental to Co-tenants Jointly—Assignment by One.

Where there is a joint lease by two tenants in common for an entire rental, and neither has given

notice to the lessee to pay his share of the rent to himself, an assignment by one to a stranger of all his interest in the rental does not cause an apportionment of the rent, or affect in the slightest degree the rights or remedies of the other. *Swint vs. M' Calmont Oil Co.*, 184 Pa., 202 (1898).

Sec. 162. Assignees of Assignor with Notice.

The assignees of one who takes a lease with knowledge of a prior lease and of the facts on which depends the question of the forfeiture thereof, have no greater rights against the prior lessee than their assignor. *Henderson vs. Ferrell*, 183 Pa., 547; 38 Atl. 1018 (1898).

Sec. 163. Joint Ownership and Liability.

A written assignment of an undivided one-half of the lessee's interest in an oil and gas lease, together with his entire gas right therein, makes the assignee a joint owner of the lease and jointly liable thereunder with the original lessee. *Jackson vs. O'Hara*, 183 Pa., 233; S. C., 38 Atl. R., 624 (1897).

Sec. 164. Actual Entry not Essential to Commencement of Assignee's Obligation.

The fact that possession was never actually taken by assignees of an oil and gas lease will not prevent their liability to pay a specified rent until the completion of an oil well upon the premises. *Edmonds vs. Mounsey*, 15 Ind. App., 399 (1896); S. C., 44 N. E. Rep., 196.

Per GAVIN, J.:

"The overwhelming weight of authority, both in England and this country, is against the doctrine that actual entry is essen-

tial to the assignee's liability. Whatever may be the rule as to an ordinary lease, where the subject-matter is susceptible of actual possession and physical enjoyment, as to rights created by (oil) leases such as this, where, until the well is commenced, there can be no further enjoyment than the possession of the right, which may be exercised at will, the authorities bearing directly upon the proposition involved, authorize us to declare that the obligations of the assignees are not postponed until actual entry upon the land."

Sec. 165. Not Necessary to Plead Assumption by Assignee—Statute of Frauds.

In a suit by a lessor of a natural gas lease, against an assignee of such lease, it is not necessary to plead an assumption thereof by the assignee, nor is such transaction affected by statute of frauds. *Ibid.*

Sec. 166. Oil Lease—Partnership Assets.

A demise of land for a term of years with the exclusive right and privilege of boring for oil, etc., though held by owners in undivided shares in their individual names, may be converted into partnership assets like any other chattel, and an assignment by one partner of his share therein, without the knowledge and assent of the others, is subject to the priority of partnership debts. *Brown vs. Beecher*, 120 Pa., 590 (1888).

Sec. 167. Assignment of Reversion by Lessor.

Where the reversion of lands demised for oil and gas purposes has been sold by the lessor, no action will lie in his name for the use of his vendee for a breach of covenants by the lessee where no breach had occurred before the sale. *Stoddard vs. Emery*, 128 Pa., 436 (1889).

Sec. 168. Assignee of Vendee's Interest Stands upon no Higher Footing Than His Assignor.

Where the contract for the sale of an oil leasehold provided that the title should not pass until payment of a purchase-money note, an assignee of the vendee's interest, knowing that the purchase-money was unpaid, cannot defend against ejectment to enforce it, upon a belief that its lien was lost by the substitution of new notes for the original and the vendor's release of the right to have the oil run to his credit. *Brown vs. Devitt*, 131 Pa., 455 (1890).

Sec. 169. Assignment Carrying Option for a Second Lease.

A lease of land for oil and gas production, with no clause authorizing an assignment thereof, provided that if oil or gas were found, the lessee should have the refusal for three months of a lease of an adjoining tract of the lessor, on terms "that may be equal to the best terms offered by any other person or persons therefor." The lease was subsequently assigned by the lessee, who made a new agreement with the lessor, with the provision that the original lease should remain in full force "in all particulars in which the same is not hereby modified." *Held*, the assignment of the first lease carried with it the option for the second lease, and the assignee was entitled to the new lease on the best *bona fide* offer made. And where the assignee, finding oil, notified the lessor of his election to take the lease of the adjoining tract, and was fraudulently informed by the lessor that he had been offered \$20,000 for the lease, and, relying on that assertion, assignee paid that sum and accepted the

lease, although the best offer that had been made to the lessor was, in fact, only \$10,000, it was *held* that in trespass for the fraud, the measure of damages was the difference between the amount paid by the assignee for the second lease, and the best offer actually received by the lessor. *Guffey vs. Cleaver*, 146 Pa., 548 (1892).

Sec. 170. Evidence of Fraudulent Representations Admissible in an Action by Payee of Promissory Note Given in Payment for Oil Leases.

This ruling may be properly said to belong to the law of negotiable instruments ; but, the case growing out of the purchase of an oil lease, resembles in certain of its features that last mentioned, and may be aptly cited here.

In an action upon a promissory note given in payment for oil leases, defendant claimed that he was induced to buy the leases by the fraudulent representations of plaintiff's agent, and that by reason thereof, he failed to discover the fraud that had been practiced upon him until about a year after the contract was executed. It also appeared that the note in suit was the fifth of six negotiable notes payable at intervals of six months from the date of sale. It appeared that the first four notes had passed into the hands of innocent parties before maturity and had been paid, and that here was presented the first opportunity defendant had of successfully defending against the payment of the notes. *Held*, that it was not too late for defendant to set up the fraud as a defence to the fifth note.

CHAPTER VII.

FORFEITURE.

As will be seen from the examination of the cases presently to be made, the trend of the decisions touching questions of forfeiture arising out of oil and gas leases has been almost uniformly in favor of the lessor. Generally, it is the lessee who is favored, and, after a substantial compliance by him with the terms of the contract, equity will not regard a technical breach. But, with mining leases, it is otherwise. This is due principally, if not entirely, to the nature of the business of mining, and, more specifically, oil mining ; to the temptation offered the shrewd operator to purchase at a nominal price the right of developing the lands, the owner of which is ignorant of their real value for any purpose, and then to hold them indefinitely, should it suit his purpose, neither working them himself nor permitting another to do so.

Of course it may be said, in a general way, that parties may make any contract which they desire, and, if a lessor should by way of lease make his intention clear to grant the oil and gas rights upon his property for an inadequate consideration, the courts will enforce it. But the lessee, where the instrument presents a semblance of inequality or unfairness, will find that he has a thorny road to travel before reaching a judicial establishment of his claims. And, in the case

supposed, the mere fact that the instrument would seem to contemplate the equivalent of an absolute gift of valuable rights would at once arouse the suspicion of a chancellor, which, if not dispelled by the clearest proof, would lead to its prompt reforming or setting aside upon the application of the proper parties.

As has been said elsewhere, leases may be almost infinite in their variety, but the practical nature of oil and gas operations has caused them to conform to a general type or form. Upon the point of covenants as to forfeiture, they may be divided into two classes: the first of the kind considered in *Wills vs. Gas Co.* (*infra*), where, by the terms of the lease, it was to be void upon the happening of a certain event, *e. g.*, the non-payment of rent; and the ruling was, that this was only *sub modo*, and that it was *not* void upon the happening of that event *unless the lessor elected to forfeit it*. (To the same effect, *Woodland Oil Co. vs. Crawford*, 55 Ohio, 161 (1896); S. C., 34 L. R. A., 62, and note. The second, doubtless, grew out of this decision, and was of the kind considered in *Hooks vs. Forst*, *infra*, where the lessor had no right to rescind, but the lessees were privileged at any time to surrender the lease and be released from all money due and conditions unfulfilled. It was *held*, in substance, that a default in the payment of the rent worked a rescission, and, a second lease having been made some months subsequently, the new lessees would be protected. The doctrine, in a word, is stated in *Bartley vs. Phillips*, 165 Pa., 325 (1895): The clause of forfeiture in an ordinary oil lease is for the benefit of the lessor, and no act of the lessee can terminate the lease under the forfeiture clause without the lessor's concurrence.

Sec. 171. Equity Abhors a Forfeiture—unless it Works Equity.

“Forfeiture is not a favorite of the law. Acquiescence in acts inconsistent with it will readily dispense with the right to claim it.” *Lanman vs. Young*, 31 Pa., 308 (1858).

Conditions that work forfeitures are not favorites of the law, and to make a provision such, must be manifest by a clear expression of intention.

Where, in a lease, certain causes of forfeiture are specified, *it is not to be inferred* that there are any grounds of forfeiture not declared to be such.

Even where the word “condition” is used in a lease, if it is evident that the parties intended it in the sense of an understanding, agreement or *covenant*, it will be so construed. *McKnight vs. Kreutz*, 51 Pa., 252 (1866).

But, equity follows the law, and will enforce a covenant of forfeiture when essential to justice. It is true, as a general statement, that equity abhors a forfeiture, but this is when it works a loss that is contrary to equity; not when it works equity, and protects the land-owner against the indifference and laches of the lessee, and prevents a great mischief. AGNEW, C. J., in *Brown vs. Vandergrift*, 80 Pa., 142 (1875).

Sec. 172. Equity Does Not Abhor a Forfeiture Where it Protects the Land-owner From the Laches of a Lessee.

In *Munroe vs. Armstrong*, 96 Pa., 307 (1880), a lease of land had been made exclusively for the purpose of producing oil. Work was to be commenced in ten days, and continued with due diligence to success or abandonment, and, if lessees failed to get oil in

paying quantities, or ceased to work for thirty days at any time, the lease was to be forfeited and void. *Held*, that a cessation of thirty days forfeited the lease.

The court, speaking through TRUNKEY, J., said :

"The agreement is plain that if the lessees failed to get oil in one well, they had a right to put down another, and as many more as they pleased, so long as they worked with diligence to success or abandonment, and equally plain that a cessation of thirty days would end their lease. They were not bound to do more than make a reasonable search for oil, but they were bound to operate or quit ; they could not hold on and be idle. The contract did not require them to keep on drilling oil wells indefinitely and without cessation, for twenty years, nor for any indefinite length of time ; neither did it entitle them, after the drilling of the well, to hold the lease for twenty years without working it. Even at the beginning of the lease, the duration of the term was qualified by the words, 'unless forfeited.' The question seems to be, shall the concise and clear expression of the agreement of these parties, as written, give way to imaginary terms more favorable to the lessees ?

"What is there in the circumstances calling for a fiction to defeat the covenant against delay in searching for or producing oil ? * * * If a well be productive, it is the interest of both lessor and lessee that it be continuously operated till its exhaustion, but, if dry, it is of no value. *Holding on to a lease after ceasing search is often for purposes of speculation*, the thing which a prudent land-owner guards against. Forfeiture for non-development or delay, is essential to private and public interests in relation to the use and alienation of property. In such cases as this equity follows the law. * * *

"In the rapid development and exhaustion of oil lands, cessation of work for nine months is a long period. Often in far less time the fluctuation in prices of land and leaseholds is very great. Perhaps in no other business is prompt performance of contracts so essential to the rights of the parties, or delay by one party likely to prove so injurious to the other."

Sec. 173. The Courts Punish the Person Committing the Breach—Not the Innocent Party.

The lessees in an oil lease covenanted to commence operations within sixty days from the date of the lease, and to complete one well within three months thereafter ; and, in case of failure to complete one well, to pay lessor for such delay \$1000 per annum within three months after time of completion of such well. It was also covenanted by the parties that a failure to complete one well or to make said payment within said time should render the lease null and void, and to remain without effect between the parties. The lessees did nothing towards drilling a well, nor did they make payment within three months after it should have been completed. *Held*,

1. In such case, a forfeiture of the lease did not happen until default made by the lessees, both in completing the well and in paying for the delay or failure to complete it.

2. Lessees having neither drilled the first well nor paid the price of delay, lessor was entitled to recover at the stipulated rate for the time lessee held the exclusive right to operate. *Galey vs. Kellerman*, 123 Pa., 491 (1889).

The court, speaking by WILLIAMS, J., said :

“The argument (of lessees) is that inasmuch as the contract provides that a failure to complete one well or to pay the \$1000 per annum agreed upon as the price of delay shall ‘render this lease null and void,’ it must be treated as void, not from and after the default which renders it void, but *ab initio*, so that a cause of action accrued before the default or by reason of it is extinguished. This construction overlooks the character of the agreement and the relation of its covenants.” * * * It “transfers the punishment for the breach of the contract from him on whose default it

arises to the innocent, injured party. * * * Their (the lessees') default takes away his (the lessor's) remedy. The acts or omissions of which he complains are an answer to his complaint. We should need the constraint of insurmountable necessity to induce us to adopt the construction contended for."

Sec. 174. Forfeiture is Not Self-operating.

A clause in a lease providing for a forfeiture thereof, in the event of a default by the lessee in the performance of his covenants, is not self-operating so as to make the forfeitures take place, *ipso facto*, upon the occurrence of the default, but being for the benefit of the lessor, it rests with him to enforce or waive it. *Westmoreland, etc., Gas Co. vs. De Witt*, 130 Pa., 235 (1889).

Forfeitures are to be strictly construed, and where a lease provides that it shall become forfeited if any of the stipulated payments are not made, the whole payment is meant, not a balance on a running account; wherefore, if a part of a payment be accepted before it is due, no forfeiture is incurred by a failure to pay the remainder in the time specified. *Ibid.*

MITCHELL, J. (254):

"Forfeitures, if no longer odious—and I, for one, am too strongly in favor of the enforcement of contracts as parties make them to apply harsh names to strict constructions—are not yet favored either at law or in equity, and among the least favored have always been those founded on mere delay in the payment of money." See, also, *Henderson vs. Coal & Coke Co.*, 140 U. S. R., 25 (1891).

Sec. 175. A Judicial History and Statement of the Law of Forfeiture in Pennsylvania.

Perhaps the fullest discussion of the law of forfeiture in Pennsylvania is to be found in the opinion

of CLARK, J., in *Wills vs. Mfrs. N. G. Co.*, 130 Pa., 222 (1889). Quoting from the English decisions and text-writers, he states their rule to be that the effect of a condition making a lease void upon a certain event, is to make it void at the option of the lessor only, in cases where the condition is intended for his benefit and he actually avails himself of his privilege.

But, says Justice CLARK, "in Pennsylvania, the older doctrine would seem at first to have been adhered to, that, in a lease for years with condition (that) if the condition be broken by the lessee, his interest was, *ipso facto*, void by the breach and no subsequent recognition of the tenancy could set it up. *Kenrick vs. Smick*, 7 W. & S., 41. * * * In *Sheaffer vs. Sheaffer*, 37 Pa., 525, the doctrine announced by Justice SERGEANT, in *Kenrick vs. Smick*, *supra*, was adhered to; the English cases were brought into contrast with the doctrine of *Kenrick vs. Smick*, and it is admitted that the rule of the English courts is followed in most of the States of the Union. In *Davis vs. Moss*, 38 Pa., 346, the rule of the previous cases is again apparently recognized, but its rigor is relaxed. * * * But the rigid rule of *Kenrick vs. Smick*, *supra*, is further relaxed in the very recent case of *Galey vs. Kellerman*, 123 Pa., 491," which he proceeds to mention with approval, concluding as follows: "Thus it appears that the distinction formerly maintained between the rulings of the English courts and of the courts of our sister States, and the rulings in Pennsylvania, is no longer found to exist. We have, by slow approaches, apparently turned into the general current of cases, in which is found, without doubt, the great weight of authority both in England and in this country."

And this position was approved in *Ray vs. Nat. Gas Co.*, 138 Pa., 589 (1890), and declared to have been taken "on due deliberation and careful study of the principles involved."

In a later case *Cochran vs. Pew*, 159 Pa., 184 (1893), the proposition is rounded out by the ruling that the legal effect of such covenants can only be

changed on express stipulation that the lease shall be voidable at the option of either party, or of the lessee. See, also, *Liggatt vs. Shira*, *Ibid.*, 350.

Sec. 176.

The following is a list of the leading Pennsylvania supreme court decisions in which the rule laid down in the last two cases is approved, "notwithstanding," as the court said in *Bartley vs. Phillips*, *infra*, "a most determined and persistent struggle of parties for a different rule": *Springer vs. Gas Co.*, 145 Pa., 430 (1891); *Ogden vs. Hatry*, 145 Pa., 640 (1891); *Phillips vs. Vandergrift*, 146 Pa., 357 (1891); *Jones vs. Gas Co.*, 146 Pa., 204 (1891); *Leatherman vs. Oliver*, 151 Pa., 646 (1892); *Sanders vs. Sharp*, 153 Pa., 555 (1893); *Nesbit vs. Godfrey*, 155 Pa., 251 (1893); *Aderhold vs. Oil Well Supply Co.*, 158 Pa., 401 (1893); *Cochran vs. Pew*, 159 Pa., 184 (1893); *Conger vs. Nat. Transit Co.*, 165 Pa., 561 (1895); *Bartley vs. Phillips*, 179 Pa., 175 (1897); *Mathews vs. Gas Co.*, 179 Pa., 165 (1897).

Sec. 177. A Promise to Drill or Pay Rent Cannot be Discharged by a Failure to Perform, even Where the Lease Would Seem to Permit.

In the case of *Woodland Oil Co. vs. Crawford*, 55 Ohio, 161 (1896); S. C., 34 L. R. A., 62, the lease contained the usual provisions, and, in addition thereto, the following:

"A failure on the part of lessee to complete such well or wells above specified, or instead thereof to pay the rental as above provided, shall render this lease and agreement null and void, together with all rights and claims," etc., etc.

Default having been made in the drilling, in an action to recover the promised rental, it was *held, inter alia*, (1) that the promise to drill a well or pay a rental cannot be discharged by a mere failure to perform the promise; (2) that upon failure to drill the well or instead thereof to pay the agreed rental, such rental may be recovered as rental and need not be sued for as unliquidated damages.

Per BURKET, J.:

“A naked default and non-performance cannot be held to discharge the obligation of the lessee.”

And the same court, in the later case of *Harris vs. Ohio Oil Co.*, 48 N. E. R., 502 (1897), re-affirmed the doctrine of the last-mentioned case and further ruled that a breach of an implied covenant to reasonably develop and protect lines does not have the effect to forfeit the lease in whole or in part, nor is it good cause for a court to declare such forfeiture, unless the lease in express terms provides that a breach of such implied covenant shall avoid or forfeit the lease. The remedy for breach of an implied covenant is not by forfeiture, but by action for damages caused by such breach.

Sec. 178. Nevertheless, the Parties may by Fitting Terms Cause the Option of Lessee to Control.

But it would seem that this point *can* be reached, and liberal as have been the interpretations in the foregoing cases, the courts will not protect the parties against themselves. Thus, in a five-year lease of land for oil and gas, a clause provided that “the lessee shall complete a well within six months from the date

hereof or in default thereof pay to the party of the first part, *for further delay*, an annual rental of \$700 in advance on the said premises from the time above specified until such well shall be completed. * * * And a failure to complete said well or pay said rental for ten days after the time above specified for so doing, shall render the agreement null and void, and it can only be renewed by mutual consent; and no right of action shall accrue after such failure to either party on account of the breach of any promise or agreement herein contained." It was *held* that the clause meant that the lessee should have an option to put down a well within six months from date of lease and by paying \$700 within ten days thereafter, a further option for one year.

Van Voorhis vs. Oliver, (C. P. Allegheny Co.,) 22 Pitts. L. J., 114 (1891), per SLAGLE, J.:

"Nothing was done under this lease. A well was not put down within the six months and the money was not paid within ten days thereafter. The plaintiff claims that at least one year's rent became payable and relies upon the cases of *Galey vs. Kellerman*, *Wills vs. Mfrs. N. G. Co.* and *Ray vs. Gas Company*, while defendant claims that he elected to abandon the lease and returned the agreement to the plaintiff.

"The contract in this case is essentially different from those passed on in those cases. In *Galey vs. Kellerman*, the payment for which suit is (was) brought, was, by the contract, to be made 'in case of failure to complete one well within such time, and was to be made for such delay'; in *Wills vs. Mfrs. Nat. Gas Co.*, 'upon the failure to do so within the time herein specified'; and in *Ray vs. Nat. Gas Co.*, 'if said well is not completed within said period.' In this case, the money is payable for 'further delay.'

"It is, therefore, questionable whether this contract would be governed by the principle of those cases, even without the clause which seems to clear it from all doubt. It not only provides that

the failure to complete a well or pay the rental shall render the contract null and void, but expressly provides that 'no right of action shall, after such failure, accrue to either party on account of the breach of any promise or agreement herein contained.' "

Held further, following the remark of Mr. Justice CLARK in *Ray vs. Nat. Gas Co.*, that, under such a clause, the transaction amounts to a mere option and the lessee may set up his own default, availing himself of what is an elective right secured to him in his contract.

To substantially the same effect, under similar provisions, are *Glasgow vs. Griffith* (C. P. Butler Co.), 22 Pitts. L. J., 181 (1891), and *Ramsey vs. White* (C. P. Butler Co.), 21 Pitts. L. J., 425 (1891). See, however, Section 181.

Sec. 179. New York Doctrine Substantially the Same as that Laid Down in *Wills vs. Gas Co.*, *supra*.

In *Allegheny Co. vs. Bradford Oil Co.*, 21 Hun., 26 (1880), affirmed, 86 N. Y., 638 (1881), a forfeiture was declared and an injunction awarded where lessee had not commenced work within time specified—nine months. His assignee, however, did begin operations seventeen months after the date of the lease. Six months previous thereto, the owner of the land had made another and similar lease of it to third parties, who assigned their lease to plaintiff, who entered upon the land and commenced to drill, also instituting suit to have the first lease declared forfeited and to restrain its holders from further operations upon the land. *Held*, that the injunction should be awarded, and that, as the owner of the land had continued at all times to occupy it, neither re-entry nor notice of his intention

to enforce the forfeiture was necessary, the execution and delivery of the new lease being sufficient notice of such intention, and defendant could not show that after the execution and delivery of the new lease, the land-owner had consented to his entering upon the land.

Sec. 180. Absence of Clause Requiring Development or Payment of Rent.

An important case, from the standpoint previously mentioned, of a lease meaning all to the lessee and nothing to the lessor, and yet being enforced, was that of *Glasgow vs. Chartiers Oil Co.*, 152 Pa., 48 (1892).

The lease contained no covenant on the part of the lessee to pay rent or develop the mines, but merely provided that it should become null and void, and all rights cease, unless a well should be completed on the premises within one month, or unless the lessee should pay rent at a certain rate per month in advance. It was *held* that the lease did not impose any obligation on the lessee to continue his explorations.

The terms of the lease were so unusual as to elicit the remark from WILLIAMS, J.: "This looks like an improvident agreement, and, as the learned judge of the court below suggests, may have been obtained by artifice." But a similar lease had been made in *Chamberlin vs. Parker*, 45 N. Y., 569 (1879), and received a substantially similar construction.

Sec. 181. A Re-statement of the Doctrine.

The cases of *Ogden vs. Hatry*, 145 Pa., 640 (1891), and *Leatherman vs. Oliver*, 151 Pa., 646 (1892),

were actions for rental upon leases, which contained a carefully worded provision to the effect that

“ A failure to complete said well or pay said rental * * * shall render this agreement null and void, and it can only be renewed by mutual consent ; and no right of action shall after such failure accrue to either party on account of the breach of any promise or agreement herein contained.”

In *Ogden vs. Hatry*, the court briefly announced its inability to distinguish the case from *Ray vs. Gas Co.*, and added :

“ There is more verbiage here, but no more force. Had the clause ended with the words ‘ null and void,’ the legal effect would have been the same. To say that a lease shall be ‘ null and void ’ upon a certain contingency is using as strong language as the subject is capable of.”

In *Leatherman vs. Oliver*, the reasons given by the court for its ruling are so clear and satisfactory that they may well be inserted here. Said WILLIAMS, J.:-

“ In considering the effect of the anomalous provision in the lease before us, two well-established rules of construction should be borne in mind. One of these is, that words should be taken most strongly against him whose words they are. The other asserts, that between two or more conflicting constructions of an instrument, that one should ordinarily be adopted that will sustain most of its provisions.

“ The clause relied on by the defendant provides, first, that if no well is drilled, and the rent remains unpaid for ten days after it is due, the agreement shall be null and void, and shall not be renewed except by mutual consent. This, as we have repeatedly said, is for the protection of the lessor, and not of the defaulting lessee. * * * The lessor may in this way rid himself of a lessee who will do nothing ; or he may, at his election, resort to his legal remedies upon the contract. The words mainly relied on by the defendant are those that assert that ‘ no right of action shall after such failure accrue to either party on account of a breach of

any promise or agreement herein contained.' To what do the words 'after such failure' relate? They must relate to the failure described in the preceding sentence, and that is not the failure to drill a well within six months, or to pay the rent on the day it falls due, but a continued failure to make such payment for ten days after it fell due.

"Let us suppose the lessor had entered, asserted the forfeiture and made a new lease to other parties for the same farm. This would have extinguished the rights, and, with them, the obligations of the lessee for the future. The contract would have become thereby null and void from and after the day when the forfeiture was asserted, and no cause of action thereafter accruing upon the covenants of the lease could be asserted. This is quite clear. But such action by the lessor could not operate as a release of the defendant from liability, by reason of any right of action which had already accrued. That is a result not among the leading consequences of the re-entry, and not 'nominated in the bond' on which the defendant relied. The construction of this agreement which we have adopted, does violence neither to its letter nor its spirit. It gives its appropriate office to every covenant in it, and makes the contract itself a reasonable and an honest one."

Sec. 182. Operate or Quit—Payment of Rent Will Not Suffice.

Where a lease for two years, and as much longer, etc., provided for the commencement of a well in thirty days, and its completion in ninety days, or, in default, the payment of an annual rent from the time specified for completion until such well should be in fact completed, it was *held* that the failure of lessee to complete a well within two years enabled lessor to terminate lease on its expiration, and the lessee could not indefinitely continue lease by payment of sixty dollars per annum after the expiration of the two years. *Western Pa. Gas Co. vs. George*, 161 Pa., 47 (1894).

Per McILVAIN, P. J.:

"To hold that the lessee can have and hold the premises for and during the term of two years, and as much longer as the sixty dollars rental is paid thereon, is to convert the lease into a perpetual option to drill for oil and gas, when the apparent purpose of the lessor was to compel the development of his land within the period of three years."

Affirmed, McCOLLUM, J., saying:

"This sum was called a rental, but it was in the nature of a penalty for the lessee's default in the performance of his covenant to commence and continue operations in execution of the purpose expressed in the lease. * * * It was manifestly intended to hasten the performance of the lessee's covenant to drill the well, and whether it is called a rental, a penalty for the lessee's default, or compensation to the lessor for the delay occasioned by it, is of no consequence."

In *Hollingsworth vs. Fry*, 4 Dallas, 345 (1800), it was said:

"Equity will not suffer a party to lie by till the event of the experiment shall enable him to make his election with certainty of profit one way and without loss any way. This mode of procedure is unfair, contrary to natural justice and in exclusion of mutuality."

Upon which PAXSON, J., in *Packer vs. Noble*, 103 Pa., 225 (1883), remarks:

"This was equity then, and it is equity now."

Sec. 183. Requirements for Enforcement of Right of Forfeiture.

In *Thompson vs. Christie*, 138 Pa., 230 (1890), it was held that, to enable the lessor to declare and enforce a forfeiture, the right to do so must be distinctly reserved; the proof of the happening of the

event must be clear; the right must be exercised promptly and the result must not be unconscionable.

But, in *Barnhart vs. Lockwood*, 152 Pa., 82 (1892), it was *held*, modifying the foregoing requirements to suit changed conditions, that, although the lease does not provide for any forfeiture, if the lessee neglects to proceed for an unreasonable time, it may amount to an abandonment of his rights. Or, to use the classification of GIBSON, C. J., in *McKinney vs. Reader*, 7 Watts, 123 (1838), an "implied surrender."

Sec. 184. Forfeiture a Question of Fact.

Where a declaration of forfeiture is asserted by defendant in an action upon an oil lease for rent, and there is evidence that the lessor, after a monthly instalment was due and unpaid, declared that the lease was forfeited, and subsequently refused to accept the rent, the question of forfeiture must be submitted to a jury. *Heinouer vs. Jones*, 159 Pa., 228 (1893).

Sec. 185. Tracts Retained must Yield Rent until Formal Surrender.

An oil lease covering several tracts of land provided for the drilling and operating of a well on each tract, a failure so to do to forfeit the lease upon such tracts as were not operated upon. Failure to comply with any of the conditions of the lease rendered it void at the option of the lessor. In the event that any piece of land failed to yield lessor a certain royalty, lessee agreed to pay a certain rental upon each such piece of land retained by him. *Held*, that the word "retained" referred to the right to operate for oil on

the premises, and this right continued until the lessee made a formal surrender of the lease. *Jamestown, etc., R. R. Co. vs. Egbert*, 152 Pa., 53 (1892).

Sec. 186. Who may Set up Forfeiture.

Evans vs. Consumers Gas Trust Co., Ind., 673 (1891), 31 L. R. A., 673, follows the ruling of the Pennsylvania courts that the stipulation that the failure of lessee to perform shall render the lease void is inserted wholly for the benefit and protection of the lessor, and that it is optional with him to avail himself of it. The lessee cannot take advantage of his own default. *Galey vs. Kellerman, supra*; *Doe, Bryan vs. Bancks*, 4 Barn. & A., 401; *Roberts vs. Davey*, 4 Barn. & A., 664.

Sec. 187. Assertion of the Right by Children of the Lessor.

Where lands are leased for oil purposes with the proviso that grantee should commence drilling within a specified time, "or thereafter pay to party of the first part five dollars per month until work is commenced," the son of the lessor, in whose possession the leases came, cannot bring an action to recover monthly sums specified for failure to drill if he has previously declared the lease forfeited and refused to take from lessee the monthly instalment.

The assertion of forfeiture of the leases by the son does not preclude other children of the lessor who are minors, and for whom the elder son acted, from maintaining this action if his assertion of forfeiture was a fraud upon them and injurious to their

rights. But if, on the other hand, it was for their advantage to free their estate from the leases, the son ought not to be allowed to repudiate the entry and assertion of forfeiture. *Wilson vs. Goldstein*, 152 Pa., 524 (1893).

Per WILLIAMS, J.:

"The learned judge said upon this subject: 'We don't think one man, a brother, can wipe out the interest of minor heirs in that way.' But his sisters were heirs of the land, not of an action at law for a breach of a contract made with their father. The act of the brother * * * did not 'wipe out' their estate or any part of it, but relieved it of the leases under which nothing had been done or was likely to be done, and placed them in a position where they could secure the development of their lands by a new lease, or make sale of them without embarrassment."

The lessors being an adult and the guardian of certain minors, a declaration by the guardian in relation to the lease, that the same was ended and void, and the lessors had no claim thereunder, was without effect toward relieving the assignee of the lease from liability for failure to perform the covenants of the lessee. *Springer vs. Citizens' Gas Co.*, 145 Pa., 430 (1891).

Sec. 188. Difference Between Striking Oil and Bringing It to the Surface.

If the lease provides for prosecution to success or abandonment with due diligence and for a forfeiture in case oil is not excavated in paying quantities on or before a certain day, the mere striking of oil will not avoid the forfeiture in case it is not brought to the surface so as to be made available. *Kennedy vs. Crawford*, 138 Pa., 561 (1890).

Sec. 189. Physical Inability to Complete Well will not Avert Forfeiture.

Inability to secure workmen because of the extreme cold weather and consequent failure to complete the well within the time specified are not sufficient to prevent a forfeiture. *Cryan vs. Riddelsperger*, 7 Pa. Co. Ct., 473, C. P. Warren County (1887).

This case would certainly seem to come under the class of forfeitures which equity abhors. By the terms of the lease, one well was to be completed within five months from date of lease, a second one in one year, and a third in two years. *The first two wells were completed according to agreement.* The third was not, although, before the expiration of the two years, lessee placed upon the leased premises timbers for a complete carpenter's rig. He was then, as above stated, unable to secure workmen to erect the rig. All that the court (BROWN, P. J.) said upon the point was:

"The lease as to this third was forfeited by the express agreement of the parties, unless some legal reason or excuse for non-completion of the work is made to appear. * * * We think the excuse is not good. It does not appear that any unavoidable accident occurred, such as, under the terms of the agreement, would entitle the defendant to an extension of time."

No citations of authorities are made and no notices taken of the numerous decisions *contra*. The ruling is certainly severely technical, and the facts appear to come within the spirit of *Fleming Oil & Gas Co. vs. South Penn Oil Co.*, 37 W. Va., 645, where it was decided that, if the place of the location of the well is fixed, the timbers provided, the contract let and the machinery ordered within the time, the mere fact that the impassable condition of the roads prevents the hauling of the machinery to the place where it is to

be used until after the expiration of the time limited for the commencement of the operation, will not justify a forfeiture.

And a recent decision of the Supreme Court of Pennsylvania follows the same line. In *Henderson vs. Ferrell*, 183 Pa., 560; S. C., 38 Atl. R., 1018 (1898), it was *held* that a lessee does not forfeit his rights, if, on the last day of the period allowed, he in good faith enters and commences operations on the premises preparatory to drilling a well, but is prevented by the lessor from proceeding therewith.

**Sec. 190. Covenant to Complete a Well or Pay Rent
Will be Enforced after Discovery that
Territory is Worthless.**

In *Springer vs. National Gas Co.*, 145 Pa., 430 (1891), the judgment was affirmed upon the opinion of the lower court, and the language of WICKHAM, P. J., delivering the opinion, is so apt as to call for its insertion here. The lease was for a term of years and contained a covenant that the lessee should complete a well within a certain time, or thereafter pay to lessors a certain sum annually *until such completion*. Defendant alleged that "soon" after the lease was executed, it was discovered that the territory was worthless for either oil or gas, and that, therefore, the first well was never completed. But this defence was adjudged insufficient, and the lower court, distinguishing the case from another decided at the same time, where the lessor was to be paid for oil or gas actually found and used, said:

"I do not think, however, that the fact of there being no oil or gas in the land, no matter how soon found out, could avail the defendant. The lessors were entitled to insist that this

fact should be made manifest in the very manner agreed upon, or to demand the sum stipulated to be paid for delay. The covenant on this subject is absolute and unqualified, and provides for the doing of nothing that is illegal or improbable. If a clear, positive covenant, like the one before us, to do a lawful thing or pay a certain sum of money for not doing it, can be evaded by showing that the performance of the act did not benefit the covenantee, it is hard to tell where we could properly stop in applying the rule. We might presently reach a point where an action for liquidated damages for breach of an agreement not to engage in a certain business within designated limits, might be defeated by proving that every one conducting the same business in the neighborhood had been losing money, and, for reasons shown, would probably continue to do so. * * * That the contract may have proved a losing one to the lessee or his assignee, the defendant, is neither here nor there. To quote the popular saying, 'a contract is a contract' and no sufficient reason appears why the one under consideration should not be enforced." See, also, *Fennell vs. Guffey*, 139 Pa., 341 (1891); *Same vs. Same*, 155 Pa., 41 (1893).

Sec. 191. Conflicting Leases—Lease Dated Before, but Recorded After Another—Purchaser for Value—Imputation of Knowledge.

The case of *Thompson vs. Christie*, 138 Pa., 230 (1890), is an important one from several points of view, and will repay a careful examination. It affords an excellent illustration of the effort that is frequently made in the oil business to set aside a prior lease and to substitute for it another taken by lessees, sometimes with knowledge of the first and the deliberate attempt to disregard it, and sometimes without notice, actual or constructive, the second lessee being left to suffer the consequences of the craft of his lessor or assignor.

The case was ejectment by the lessee in an oil lease, the defendants claiming under a like lease prior

in date, but recorded after it. To show their own title, they offered to prove that the former owners of the lease made the contract to sell it to them, received part of the purchase money, and put them in possession before suit brought. They offered to show further that, before suit brought, they expended thousands of dollars in developing the property, and that their contract for the purchase was put in writing and signed by all the assignors but one, who assented to its terms and received his share of the money paid before, but signed the contract one day after the writ issued.

It was *held* that the offer was admissible in support of the title set up by defendants, and, upon the facts stated in it, they could successfully defend their possession, if their lease was a valid and subsisting one, *unless the plaintiff, in taking the subsequent lease, acquired his title in good faith and without notice of defendant's rights.*

The court, however, recognized the established rule that a *bona fide* purchaser, without notice of a secret agreement or trust, takes the title discharged from such agreement or trust, and can convey a good title, even though his vendee has had actual notice; citing *Bond vs. Stroup*, 3 Binn., 66 (1810); *Brocken vs. Miller*, 4 W. & S., 102 (1842); *Meehan vs. Williams*, 48 Pa., 238 (1864), and adding :

“The trouble was not with the rule he invoked, but with the facts embodied in defendant's offers, which were calculated to fix him with notice.”

For these facts, however, such as plaintiff's law partner having been applied to for advice as to how to terminate defendant's lease, etc., etc., reference must be had to the report.

Upon the question of "notice by the state of the possession," see *D. & H. Canal Co. vs. Hughes*, 183 Pa., 66 (1897).

Sec. 192. Conflicting Leases—The Courts After Operations Commenced and Expenditures Made, Lean Toward the Diligent Operator.

The case of *Thomas vs. Hukill*, 34 W. Va., 385 (1890), is prefaced with a very long syllabus which may itself be summarized thus: If, after the time has expired on a first lease, and a second lease has been made to a third person, *and has expired*, the first lessee takes possession with consent of lessor, and, at great expense, produces oil in paying quantities, the holders of the second lease cannot maintain an action under their lease for possession of the premises. In this case, it was further *held* that the execution of the second lease could not be taken as conclusive evidence of a purpose to declare the first forfeited, where claim was made that it had been executed on condition that it was to be given back if first lessee objected.

The latter ruling is in conflict with the general doctrine presently to be mentioned. In the case of *Hukill vs. Guffey*, 37 W. Va., 425 (1892), a strong effort was made to induce the court to reverse its ruling as to the main question in *Thomas vs. Hukill*, *supra*, but without success. That case, unlawful detainer, was treated as *res judicata*, and not to be brought into question again in a suit in equity. ENGLISH, J., filed a strong dissenting opinion upon the ground that the case was not then before the court upon the question of equitable relief, and that two of the parties to the second proceeding were not parties to the first.

Both opinions are recommended to the attention of the profession ; both are sustained by recognized authorities. The difference is altogether in the point of view.

Sec. 193. Acceptance by Lessee of a Second Lease Works Recission of First.

A notice by a lessor in possession to the lessee that the lease is forfeited, is substantially a declaration that he will refuse to give the lessee possession, and, if the lessee assents to this action and accepts from the lessor a new lease, he rescinds the former lease and terminates all his rights thereunder. *Nat. Gas Co. vs. Phila. Co.*, 158 Pa., 317 (1893).

And the assignee of the first lease was held to be bound by such notice, even though it was not till after a test-well had been drilled and a large sum expended that such assignee found that the lessor was treating it as in possession under another and later paper which it had never seen. *Ibid.*, pp. 328-329.

A lessor is not affected by a mere general rumor that the lease has been assigned by the lessee to another person. The information as to such assignment must come from some person interested in the property, and must be directly communicated to the lessor. *Ibid.*, 317.

Sec. 194. Waiver.

The right of a lessor in an oil lease to insist upon a forfeiture by reason of a failure to put down the seventh well within the stipulated time is waived by his acquiescence in the failure to put down two or three of the preceding six wells within the times

stipulated in the lease. *Duffield vs. Hue*, 129 Pa., 94 (1889).

“The lessee might well believe from such acquiescence that strict performance of the terms of the lease as to the time of putting down the wells would not be insisted on, and that a reasonable notice should be given before a forfeiture could be claimed on account of failure to sink the seventh well.” *Ibid.*, p. 109. See, also, *Helme vs. Ins. Co.*, 61 Pa., 407 (1869); *Hukill vs. Myers*, 36 W. Va., 639 (1892).

Sec. 195. A Waiver of the Time Within Which Operations Shall Commence is not Necessarily a Waiver of the Time for Completion.

Cleminger vs. Baden Gas Co., 159 Pa., 16 (1893).

In this case, there was a delay *in starting operations* within sixty days. The lessee, desiring to assign the lease, had a conversation with lessor as to the delay. The result of this conversation he stated to be as follows :

“The conclusion was that the lessor acquiesced in the delay and acknowledged the lease on the assurance that there would be a well put down.”

Held, that there was no waiver of the right *to have a well completed* within five months.

Sec. 196. Receipt of Rent Construed as a Waiver.

The forfeiture depends upon the terms of the instrument, unless there be evidence to effect the landlord with a waiver of the breach, like the *receipt of rent*, or other equally unequivocal act. *Davis vs. Moss*, 38 Pa., 346 (1861).

Sec. 197. Laches.

Failure to demand a sum stipulated for each oil and gas well when begun is not laches which will work a forfeiture of the right to collect the amount under a contract by which the owner of the gas lease agrees to pay such sum for each well put down before drilling it. *Pittsburg Cons. Coal Co. vs. Greenlee*, 164 Pa., 549 (1894).

Sec. 198. Estoppel.

If oil has been found in paying quantities and the lessee has expended large sums of money, with the knowledge of the lessor, the latter will not be permitted to forfeit the lease, for an inadvertent failure to pay the rent on the precise day when due. *Lynch vs. Versailles Fuel Gas Co.*, 165 Pa., 518 (1895).

Said Mr. Justice MITCHELL:

"There is a wide distinction even in equity between forfeitures for failure of punctual payment of money where time is of the essence of the contract and where it is not. If parties choose to stipulate for matters as essential, it is not for courts to say they are not so, but in the absence of a clear agreement for materiality, courts will look into the nature of the transaction and be governed by the real bearing of the facts upon the intentions and rights of the parties."

This ruling was followed in *Steiner vs. Marks*, 172 Pa., 400 (1896), where a lessor by his acts and declarations lured the lessee into the belief that a forfeiture would not be enforced for a default of one day in the payment of rent.

Sec. 199. The Same Lessor Encouraging the Expenditure of Money in Operations on the Lease.

Where an oil and gas lease was for the term of one year and as long as oil or gas was found, etc., the lessee drilled during the year, but failed to develop oil or gas in paying quantities. The lessor brought trespass against the lessee for entering to prosecute further drilling several months after the year had expired.

Held, that under the testimony, the jury were properly instructed that if the lessor, after the expiration of the year, and before the alleged trespass, encouraged and allowed the expenditure of money and labor in operations on the lease, on the basis of its continuance, he would be estopped from asserting that it was then at an end. *Riddle vs. Mellon*, 147 Pa., 30 (1892).

Sec. 200. Surrender.

A surrender is the yielding up of an estate for life or years to him that has the immediate reversion or remainder, wherein the particular estate may merge or drown, by mutual agreement.

Co. Litt., 387 b.

A surrender may be either express, as by written notice, or the delivery of the key to the house or premises accompanied with proper words to that effect, or it may take effect by operation of law where the parties have done some act which implies that they both agreed to consider the surrender as made. A more frequent method is by abandonment by lessee and re-entry by lessor without meeting face to face.

An abandonment by the tenant of demised premises is such a relinquishment as amounts to an implied

surrender, and justifies an immediate resumption of the possession by the landlord. *M'Kinney vs. Reader*, 7 Watts (Pa.), 123 (1838).

Per GIBSON, C. J.:

"What is wanting to the rescission of an executory contract is the assent of the parties; and it may be signified by their words or their acts. The rescission of a lease by express words is called a surrender in fact; and when by acts so irreconcilable to the continuance of the tenure as to imply the same thing, it is called a surrender in law."

Whitcomb vs. Hoyt, 30 Pa., 409 (1858), was not an oil case, the statement of facts showing it to have arisen upon a question of title acquired by residence and settlement; but the following extract from the opinion may be read with profit:

"Abandonment is an entire dereliction of the possession and occupancy of the property on the terms by which it may be held under the statute. This is not the most general sense of the term, but the one in which it is to be considered here. Its application to its appropriate subjects is by two different processes. One by the act of the law, to be pronounced by the law upon a given state of facts—the other by law and fact together, to be determined by the jury under instructions from the court. The first is forfeiture in the clearest sense, regardless of intention or merit—the last regards both these questions where they exist, and relieves in a proper case from forfeiture. Lapse of time is the usual element that gives vitality to abandonment as a matter of law, while it may be quite an immaterial ingredient in a case where it assumes a mixed character of law and fact; for a settler may, by unequivocal acts and declarations, abandon as effectually by lapse of a day, nay, of an hour, as he could in a year.

Sec. 201. Abandonment, or Implied Surrender.

Perhaps the most important case upon this subject and one which would seem to settle the law of Pennsylvania finally, is that of the *Venture Oil Co. vs.*

Fretts, 152 Pa., 451 (1893). In 1883, G made to R a lease, one of the objects of which was stated to be "the mining and excavating for petroleum or carbon oil, gas or other valuable mineral or volatile substances," operations to begin on some one of the farms held by R in that vicinity, and within six months from date of lease. In case oil should be found in paying quantities on any one of the farms, operations were to be begun on any one of the farms next adjoining within sixty days, and continued "until all lands leased in this township are tested to success or abandonment."

R made a test-well within the required time, but neither oil nor gas was found. He then drew the casing, plugged the well, and abandoned it. This was in 1884. Six or seven years later, nothing more having been done by R on any one of his leases, G made a new lease to other parties. R then brought ejectment.

Said Mr. Justice WILLIAMS, speaking for the court:

"Cases like the *Kemble Coal and Iron Co. vs. Scott*, 90 Pa., 333, have little or no resemblance to the case before us. A vested title cannot ordinarily be lost by abandonment in a less time than that fixed by the statute of limitations, unless there is satisfactory proof of an intention to abandon. *An oil lease stands on quite different ground.* The title is inchoate and for purposes of exploration only, until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found, then the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract."

"He (the lessee) could abandon whenever he was satisfied, from the search made, that the further expenditure of time and

money upon any given farm, or upon the body of farms covered by his leases, would be fruitless. Whenever he did so abandon a given farm, or the whole body of leased farms to which his contract referred, his rights therein were at an end. *Duffield vs. Hue*, 129 Pa., 94; *McNish vs. Stone*," reported in foot-note, 152 Pa., 457.

The case last named was a decision of the same court in 1879, discovered by the industry of counsel for the lessor in *Venture Oil Co. vs. Fretts*, and practically ruling it. It was ejectment upon a lease for ninety-nine years, executed in 1864, of "the exclusive right to bore or mine for Seneca oil or other minerals"; "also the right to enter * * * and search for, find and procure" oil and other minerals.

The lower court, in an opinion by WILLIAMS, P. J., later Mr. Justice WILLIAMS, of the Supreme Court, said:

"The contract of December, 1864, is peculiar and one of those instruments to which the development of the oil business has given rise. It is not a grant of land, or a present leasehold interest therein. It is not a grant of the mineral, etc., in place or under the land, but the 'right to search for oil,' etc., and the right to enter and occupy for the purpose of such search, and no other. If the search is fruitless, it is at the cost of the explorer. When the search is abandoned, the right of entry is gone. *But*, if the search is successful, then the explorer becomes a tenant for the purpose of operating the land at the rent agreed, and his right of possession exists not for the purpose of search, but for the purpose of operating the oil or minerals which his search has discovered. Whether the tenancy exists depends, therefore, on whether the oil which is its object is found to exist upon the land."

The Supreme Court, in a *per curiam* opinion, said:

"We entirely concur in the conclusions of law of the learned judge below upon the facts as found by him, and the judgment entered in favor of the defendant."

An important conclusion not given in the official report, but obtained from the paper book, was the affirmation of defendant's fifth point, which read as follows :

" If no entry was ever made or work done on the land under the agreement for a period of more than twelve years, but, on the contrary, the Oil Co., assignees of H, abandoned work on the well, sold or removed their engine-house, engine and boiler, and allowed their derrick to be destroyed, and did not hold a corporate meeting or do any business whatever for a period of ten years before their assignment to plaintiffs, *a surrender may and ought to be implied.*"

Sec. 202. The Same.

In the case of *Crawford vs. Ritchie* (W. Va.), 27 S. E. Rep., 220 (1897), the case of *Venture Oil Co. vs. Fretts*, was considered at length and approved, the court adopting the language of Justice WILLIAMS, quoted above, and adding :

" If defendant had possession under the terms of his contract, and developed gas and oil, or either, he would have had vested rights, of which he could not have been ousted or divested ; but the lease being ' for the sole and only purpose of drilling and operating for petroleum oil and gas, for the term of twenty years, or as long thereafter as oil or gas is found in paying quantities,' and providing that he shall commence within a month in the first instance, and afterwards a few months, when it is by consent renewed and extended from October 26 to November 28, 1889, to begin the work, he must be presumed to have abandoned it."

Upon the question of the propriety of equitable interference, the court also cite *Eckman vs. Eckman*, 55 Pa., 269 (1867).

Sec. 203.

The doctrine in regard to abandonment as set forth in the preceding sections has been re-affirmed in the recent and important case of *Elk Fork Oil &*

Gas Co. vs. Jennings, U. S. Cir. Ct., W. Va., 84 Fed. R., 839 (1898). Especial attention is directed to the facts as set forth in the opinion of the court, whose action upon them will be seen to have been taken after careful consideration of the leading authorities which are cited.

The contest was between rival lessees. *By different leases* in substantially the same terms, obtained from sundry parties, a lessee acquired the exclusive right in a large territory "of drilling and operating for petroleum oil and gas." He stipulated to give the lessors a certain proportion of the oil obtained and pay them a fixed sum annually for each paying gas well; and he was required, on pain of forfeiture, to complete one test-well within the territory in one year from the date of the leases. It was *held* that he did not, immediately upon the performance of this latter condition, become vested with an absolute right for ten years to the oil and gas privileges in the *whole territory*, but was bound within a reasonable time thereafter, to search for these minerals *on the premises described in each lease*, and a failure to do so as to some of the leases was an abandonment thereof.

Per GOFF, C. J.:

"With the conclusion reached by the lessors that Johnston (the lessee) had abandoned the leases, we fully concur, and we further find from the evidence that, as to these particular leases, it *was* his intention to do so. Both public and private interests require that such facts as are disclosed by the testimony in these cases should be held by a court of equity to constitute abandonment of the leases involved, because of non-development. It should be kept in mind that Johnston in all these leases was the party who was to take the initiative. He was the actor who was to commence development and make the search on all the land

described in them. This he, for reasons of his own, so far as these particular leases were concerned, failed to do from 1889 to 1897. He now asks a court of equity, after such unreasonable delay on his part, and gross neglect of his implied duty, and after there has been a material change in the situation, brought about by the efforts of others in interest, to decree that he is entitled to the possession of the property he had abandoned. To so decree would be not only unconscionable, but it would retard the development of the country, and at the same time it would reward those who have been negligent, and punish those who have been prompt, in the discharge of their contract duties.

“After Johnston caused the Smith well to be drilled it was his privilege to determine—using for that purpose the information secured by that well—in what direction and in what particular tracts of land he would make his subsequent developments, and, if, in so doing, his conduct and his declarations resulted in the abandonment of the leases located in other sections, for any misfortune occasioned to him thereby he must hold his own judgment responsible and not the judgment of this court. It was evidently not the intention of Johnston, when the numerous leases were executed to him in 1889, amounting in the aggregate to over twenty thousand acres, to drill wells upon each and every separate tract; but he intended, using each separate search as an indicator, to locate, if possible, the points where oil and gas could be found, and, having done that, to abandon those leases that previous development had shown to be located in unprofitable localities. That he, and those operating under him, regarded the leases in the Elk Fork region of Tyler County as worthless, in an oil-producing sense, is, we think, fully shown by the testimony, and such conclusion on his and their part is but another illustration of the uncertainty and surprises that come to those engaged in the development of oil territory.”

An important feature of the case is treated as follows :

“The fact that all of the Paova leases contained the following clause, ‘subject to the Johnston lease,’ must be considered in connection with the circumstances surrounding the parties when they executed the same. In our judgment, the lessors intended

by these words to incorporate into their contracts the fact that they had advised their lessee that the land had been theretofore leased to Johnston, and that he was to take it subject to the old lease, with the understanding that *if the Johnston lease was valid, he took nothing by the new grant*, but that if it was invalid, the conveyance was then to stand as a contract between the parties. To hold, as insisted upon by counsel for defendants, that said words were intended as an admission of the validity of the Johnston leases, would be to hold that the parties to the new leases admitted by them that the lessor had nothing to grant, and that consequently there was nothing for the lessee to take. Clearly does it appear that such was neither the belief nor the intention of the parties. Under similar circumstances, learned counsel would doubtless have employed other and more apt language, but still we think the words used are sufficient to enable the court to read the contract as we have construed it, and thereby get not only near to, but exactly at, the intention of the parties."

Sec. 204.

In *May vs. Hazlewood Oil Co.*, 152 Pa., 518 (1893), the lease provided that the lessee should commence and prosecute to completion a test-well for oil or gas on the demised premises, or upon other lands in the vicinity thereof, within thirty days after leases to the amount of 5000 acres should have been obtained by the lessee, or else forfeit the right granted by the lease, and should lessee fail to obtain leases covering 5000 acres by January 1, 1887, lessee should thereupon elect to proceed and drill as before stated in the lease, or, at its option, forfeit the lease. It was further agreed that the lease should be determined at the option of lessee, should a fair test fail to develop oil or gas in quantities to warrant further operations, notice of such determination to be given lessor in writing. The lease further provided for the payment of one dollar

per acre for not drilling and prosecuting to completion one well on the premises within one year from the date of the lease.

In an action to recover the rental provided by this clause, it was *held* that an affidavit of defence was sufficient which averred that a test-well was actually drilled, and that it proved to be a dry hole, yielding neither oil nor gas, and that the test proved that neither oil nor gas was to be found upon the premises ; that defendant openly and publicly removed the drilling machinery from the premises, and abandoned all further operations thereon, and that plaintiff, well knowing that the well was a dry hole, and that the premises had been abandoned, made no claim upon the defendant for any sum of money due under the lease for several years, and waived the service of written notice of forfeiture by defendant ; and that subsequently plaintiff granted to another party an option to purchase all the underlying coal upon the premises. Cf. *Stage vs. Boyer*, 183 Pa., 560 (1898).

Sec. 205. Question for Jury.

In an action of ejectment to recover possession of land leased, where defendants claimed that plaintiffs had abandoned their rights under the lease, but this is denied by plaintiffs in their abstract of title, the question of abandonment is a mixed question of acts and intentions which must be submitted to a jury. *Bartley vs. Phillips*, 165 Pa., 325 (1895).

As against any but the grantor, an abandonment is not complete until the statutory period of limitation or the end of the term granted, and possession may be resumed by the grantee at any time previous. *Ibid.*

An action of ejectment cannot be maintained against a lessee in an oil lease by a stranger (in this case a mere squatter) on the ground that the lessee had abandoned the premises, where there is no evidence that the lessor had exercised his right to forfeit the lease. *Ibid.* See, also, *Mitchell vs. Cordu*, 21 W. Va., 277; *Chaucy vs. Smith*, 35 *Id.*, 404.

Sec. 206. Lack of Railroad Facilities no Excuse for Abandonment.

Under a lease providing for a forfeiture, if the enterprise should be abandoned for twelve months, an allegation by lessees that they were working other leases and "were approaching these lands as fast as they could, and that they could not work these lands for want of railroad facilities" constitutes no excuse. *Willard vs. Mitchell*, 140 Ind., 406 (1894).

Per McCABE, J.:

"Counsel's contention is that the enterprise could not be abandoned unless it had been begun. They insist that the meaning of the contract is that the lease continues to subsist for the full term of twenty years, though not a single thing is done under it on the land, and even though no intention exists on the part of the lessees to do anything under the terms thereof. We think it quite clear that such was not the intent of the parties as gathered from the lease itself. No reason is perceived why it would not be as injurious to the lessors to fail to commence operating the mines and quarries for twelve months as to cease operating them, after beginning, for a period of twelve months." *

* Nevertheless, in *Baumgardner vs. Browning*, 12 Ohio, C. C. R., 73 (1896), the lessee was allowed a period of five years and six months, the court declining to decree a forfeiture on account of non-user.

Sec. 207. Re-entry by Lessor Not Necessary in Pennsylvania to Assertion of Right of Forfeiture.

Where there is a breach on the part of a lessee of the conditions contained in a lease, an entry by the lessor is not required by the laws of Pennsylvania to complete the forfeiture. The rule on this subject of England and of New York and other American States has not been adopted in this State, especially where the lease or agreement is executory and contemplates a concurrent possession by the parties. *Sheaffer vs. Sheaffer*, 37 Pa., 525 (1861); followed in *Davis vs. Moss*, 38 Pa., 346 (1861).

Sec. 208.

If the lease contain a clause of forfeiture but no clause of re-entry for such forfeiture, demand and re-entry are not the only mode by which the landlord may enforce the forfeiture. *Guffey vs. Hukill*, 34 W. Va., 49 (1890); S. C., 11 S. E. Rep., 754.

Sec. 209. The Making of a Second Lease After Default of Lessee, an Election to Forfeit.

A lessee in an oil and gas lease agreed in 1866 to complete a well within six months, or pay lessor for such delay a certain sum per annum, within three months after the time for completing the well. In 1887, six days after nine months from the date of the lease, the lessor, without demanding payment of any sum from lessee, leased the premises to another person for a long term of years. In 1891, he brought suit against the first lessee for the first year's rent claimed to be due under the lease. *Held*, that the action of the lessor in making a second lease was an

election by him to enforce a forfeiture, and thenceforth the lease was a nullity. *Wolf vs. Guffey*, 161 Pa., 276 (1894).

To the same effect, *Allegheny Oil Co. vs. Bradford Oil Co.*, 21 Hun., 26; affirmed 86 N. Y., 638.

But in *Schaupp vs. Hukill*, 34 W. Va., 375 (1890), F having given an oil lease to H, afterwards gave another of the same property to S, upon which was endorsed: "This lease to be taken subject to the H lease." *Held*, that the second lease was not an unequivocal declaration of forfeiture of the first.

Sec. 210. Mortgage of Leasehold Contrary to Stipulation Works Forfeiture.

Where a clause in a lease prohibits the transfer thereof by the lessee, under penalty of forfeiture, the mortgaging of the leasehold by said lessee will constitute a sufficient ground of forfeiture. *Becker vs. Werner*, 98 Pa., 555 (1881).

Note the language of PAXSON, J.:

"The mortgage upon the leasehold through which he (the purchaser at the sheriff's sale, under the mortgage) claims, fell with the forfeiture. The creation of the mortgage was prohibited in substance by the lease, and was a ground of forfeiture. The lessee, having no right to assign his lease, could not do so indirectly by mortgaging it. *As against the landlord the mortgage was a nullity*, and it cannot be successfully set up as against the title acquired through the forfeiture and constable sale."

Sec. 211. Erection of Building on Leased Ground, Not an Assertion of Right of Forfeiture.

The erection by lessor of a building on one of two vacant lots leased for oil and gas purposes, the lease reserving to lessor the right to use the premises, except such part as should be necessary for the drilling of wells, is not an assertion of the right of

forfeiture. It is not such an unequivocal act indicating an intention to resume possession of the leased property, as terminated thereafter his right to demand rent.

But the absolute conveyance of one of the lots is a constructive eviction, and ends a liability for rent. *Mathews vs. Gas Co.*, 179 Pa., 165 (1896).

Sec. 212.

Defendant leased from plaintiff a tract of land for the purpose of mining petroleum, covenanting to commence operations within ten days, to complete a well within four months, and, "if a well is not completed within eight months, then this lease is to be void and end. A second well to be drilled upon the farm if the first well is large enough to justify it." Evidence was given to show a contemporary parol agreement by defendant, not inserted in the lease, to put down wells to develop the land and protect the lines, and to offset the wells put down in adjoining lands. *Held*, that all the agreements, except that with reference to the first well, were mere covenants, and that the breach of any or all of them could not be construed to operate as a forfeiture, to enforce which ejectment would lie. *Janes vs. Emery Oil Co.*, 1 Penny. (Sup. Ct. Pa.), 242 (1881).

Distinguishing *Hamilton vs. Elliott*, 5 S. & R., 375, as a case of a grant upon express condition, in which it was *held* that upon breach, the estate reverted without the necessity of re-entry, as the grantor was in possession.

To the same effect, *Ohio Oil Co. vs. Harris*, 1 Ohio N. P., 132 (1894).

**Sec. 213. Entrance for Preservation of Machinery, Not
a Continuance of Operations.**

The entry of lessees, after suspension of operations under a mining lease for the maximum period, to clean and grease an engine which had been erected on the premises and used in mining, is not a continuance of mining operations and will not prevent a forfeiture. *Davis vs. Moss*, 38 Pa., 346 (1861).

CHAPTER VIII.

OBLIGATION OF LESSEE.

As a moment's reflection will show, the subject of the obligations assumed by the lessee of a mine, be it of what nature it may, is one of the most important character. Too often, in daily practice, the lease is signed without adequate perusal, if any be given it at all. In the event of success in the development, no contentions are apt to arise on this score ; but let the reverse be the case, and perhaps for the first time the contract is studied, with the result that one of the parties finds himself in the grasp of a construction which the law reads into the instrument, but of which he knew nothing at the time of its execution.

The earlier decisions concern, of course, leases other than those of oil and gas, but, as is observed elsewhere, the same general principles pervade the law of all the minerals ; and while, as will be seen, specific authorities on oil and gas are not lacking, enough may be gathered, from an examination of a few of the deliverances of the courts upon the questions arising under coal and other leases, to show as well the uniformity as the soundness of the doctrines enunciated by them upon this subject.

One point of difference will be noted with satisfaction, however :

The terms and conditions of coal and ore leases seem infinite in their variety, and, of course, the effort

of the courts is to give effect to the contract as it is written, to the intent of the parties as it can be gathered from the terms of the instrument. As a rule, however, oil and gas leases conform to one general type, and the door is thus closed against the numerous, and at times conflicting, constructions placed upon contracts for other minerals.

The doctrine in Pennsylvania as to coal seems to be established by the case of *Muhlenberg vs. Henning*, 116 Pa., 138 (1887), which was an action of covenant brought upon a lease by which lessee agreed to pay lessors thirty-five cents for every ton "of clean merchantable ore raised," etc., and further to mine a certain number of tons annually during the continuance of the lease, or, in default thereof, pay a *royalty* of \$525 annually. Lessees entered, and, at an expense of \$3000, erected all the machinery and appliances necessary. They prosecuted their undertaking with due diligence for nine months and more, but failed to find sufficient ore to enable them to carry on the operation as contemplated, and further, that such ore as was found was not "merchantable." *Held*, that lessee was discharged from liability, CLARK, J., recognizing *Johnson vs. Cowan*, 59 Pa., 275, and the duty of the lessees to search for and find the ore, and to ascertain its quality, but adding:

"If, however, it was established by actual and exhaustive search, that, at the time of the contract, there was in fact no ore in the land, or no ore of the kind contracted for, it cannot be pretended, upon any fair or reasonable construction of the contract, that the lessees were bound for the 'royalty' of \$525 annually; for the payment of the royalty was undoubtedly based upon the assumption of the parties that ore of the quality specified existed then. * * * How could the lessees be *in default* in mining 1500 tons annually, if there was no ore to mine? We are not to construe the contract

to require the lessees to perform an impossible thing. The \$525 is not a penalty; it is the price of the ore. * * * As well might the vendor of meat which proved to be putrid, or of a cargo of corn which had no existence, enforce collection from his vendee. We think the manifest meaning or intention of the parties, as exhibited by the terms of the contract, was that 1500 tons 'of clean and merchantable iron ore' were to be mined in each year, *if that quality and quantity of ore were there found*, and that the contract by necessary implication must be so construed."

To the same effect, *Gribben vs. Atkinson*, 64 Mich., 651. And see *Cook vs. Andrews*, 36 Ohio, 174; *Scioto F. B. Co. vs. Pond*, 38 Ohio, 65; *Reed vs. Beck*, 66 Iowa, 21. *Contra, Clark vs. Midland B. F. Co.*, 21 Mo. App., 58.

Sec. 214. The Same.

And the case of *Kemble Coal & Iron Co. vs. Scott*, 90 Pa., 332 (1879), was cited, as "in accord with and fully sustaining" the ruling made. In that case, Scott granted to the company the exclusive right to dig, etc., the company covenanting to pay at the rate of fifty cents per ton of ore mined, etc. And further that, for any period of three years, after the first, the rent in the aggregate should not be less than \$10,000, *whether ore to that extent was mined or not*. At the end of four years Scott brought suit and recovered a judgment for \$10,000, rent accrued in the three preceding years, and, at the expiration of three years more, brought a second suit to recover \$10,000, the alleged minimum rent for that term. The Supreme Court of Pennsylvania held it competent for the company to prove by way of defence that the ore contained in the leased premises was insufficient in quantity to produce the amount of rent or royalty claimed by the plaintiff. See, also; *McCahan vs. Wharton*, 121 Pa., 424 (1888).

Sec. 215. But the Law Implies a Covenant to Work the Mines with Reasonable Diligence.

Where a right to mine iron ore or other minerals is granted in consideration of the reservation of a certain proportion of the product to the grantor, the law implies a covenant on the part of the grantee to work the mine, in a proper manner and with reasonable diligence, so that the grantor may receive the compensation or income which both parties must have had in contemplation when the agreement was entered into. *Koch's Ap.*, 93 Pa., 442 (1880).

In *Boyer vs. Fulmer*, 176 Pa., 282 (1896), the doctrine advanced in *Muhlenburg vs. Henning*, *Kemble Coal & Iron Co. vs. Scott*, and *McCahan vs. Wharton*, *supra*, was re-affirmed, and the case of *Timlin vs. Brown*, 158 Pa., 606 (1893), shown to be easily distinguishable from them. That was a case of an absolute engagement to pay a royalty on 10,000 bushels of coal each year—the minimum purchase price of the coal, whether there was any coal there or not.

A covenant to work the mine continuously, however, cannot be inferred from an agreement to carry on the mining operations in a safe, skillful and workmanlike manner. *McIntyre vs. McL. Coal Co.*, 105 N. Y., 264.

Sec. 216. Lessee's Neglect to Mine, No Defence.

STRONG, J., in *Anspach vs. Bast*, 52 Pa., 358 (1866):

“They (the affidavits of defence) affirm only that the defendant had not taken from the mines coal sufficient to pay the note before it matured, and that, some time before its maturity, there was a great stagnation in the coal business and a general stoppage of coal operations in the regions where the mines are located, and that no coal had been shipped from the mines after

that time. It is manifest that an inability to pay the note out of the coal mined, *arising from defendant's neglect to mine*, was not a defence according to his own showing. The promisee was not to run the risk of business stagnation. The defendant had unconditionally agreed to work the colliery with diligence and constancy. From this agreement he was not released by the fact that he could not mine profitably, or that he could not sell coal, or that he did not send it away from the mines. According to his own averments, it was not inability to make profit or to carry on business successfully, but inability to take out sufficient coal with diligent and constant work, that entitled him to delay or an extension of the time of payment; yet such an inability he has not averred. The affidavits, therefore, fail to exhibit any defence to plaintiff's claim."

In *Lyon vs. Miller*, 24 Pa., 392 (1855), the Supreme Court affirmed a charge, *inter alia*, that the plaintiffs, in addition to compensation for the coal mined under the lease, were also entitled to recover "for what the defendant reasonably could and should have mined upon the land leased."

**Sec. 217. The Rule the Same as to Oil and Gas Wells :
"Operate or Quit."**

TRUNKEY, J., in *Munroe vs. Armstrong*, 96 Pa., 310 (1880) :

"They (the lessees) were not bound to do more than make a reasonable search for oil, *but they were bound to operate or quit*; they could not hold on and be idle."

Sec. 218. The Same.

In *Ray vs. Nat. Gas Co.*, 138 Pa., 589 (1891), Mr. Justice CLARK expands the terse statement of the law by Mr. Justice TRUNKEY, as follows :

"Whilst the obligation on the part of the lessee to operate is not expressed in so many words, *it arises by necessary implication*.

* * * If a farm is leased for farming purposes, the lessee to deliver to the lessor a share of the crops, in the nature of rent, it would be absurd to say, because there was no express engagement to farm, that the lessee was under no obligation to cultivate the land; an engagement to farm in a proper manner, and to a reasonable extent, is necessarily implied. The clear purpose of the parties to this lease was to have the lands developed, and the half-yearly payments, and the other sums stipulated, were intended not only to spur the operator, but to compensate Ray for the operator's delay or default. The lessor's hands have been tied for two years. We do not know that he lost anything in royalties, or that he suffered by drainage, for the territory might have proved unproductive; but, as the transaction was founded in the hope that either oil or gas, or both, might be found in paying quantities, it was competent for the parties to contract in advance for the amount of compensation to which, in the event of delay or default in development, the lessor would be entitled. The provision for forfeiture was doubtless inserted in anticipation that the lessee might make default and become unable to pay, in which event he might put an end to the lessee's pretensions and seek other means of development. This clause having been inserted as a protection to the lessor, he had the right either to declare the forfeiture or to affirm the continuance of the contract; and, if the lessor did not choose to avail himself of the forfeiture, the lessee cannot set it up as a defence to an action in affirmance of the contract." *Galey vs. Kellerman*, 123 Pa., 491; *Wills vs. Natural Gas Co.*, 130 Pa., 222.

And the same idea is expressed by the Supreme Court of Appeals of Virginia. The owner of land, in which there was an iron mine, leased for twenty years the privilege to mine and haul off all iron and other minerals on his land, lessees to pay by the ton for all minerals obtained, and to commence developing in sixty days from date of lease. *Held*, that they had not the option to work, or not to work the mine for an indefinite time. *Rorer Iron Co. vs. Trout*, 83 Va., 397.

Per RICHARDSON, J. :

"The lease was for a term of twenty years ; yet, looking to its nature and object, it cannot be contended that the lessees had the option to work or not to work the ore mines for an indefinite time, and thus convert what was designed to yield a handsome daily income to the lessors into a mere barren incumbrance on the land—a cloud on its title, an incubus and a manacle, which would oppress him and destroy the marketable value of his land. No lease of land for a rent, for a return to the landlord out of the land which passes, can be construed to be intended to enable the tenant merely to hold the lease for the purposes of speculation, without doing and performing in connection therewith what the lease contemplated. Such a construction would, indeed, make all such contracts a snare for the entrapment and injury of the unwary landowner. A man buying and paying for land may do with it what he likes—work it or let it lie idle. But a tenant to whom land passes for a specified purpose has no such discretion. He must perform what he stipulated to do."

Sec. 219. Operations Must be Conducted According to the Ordinary Course of Business.

The covenant to "commence operations within six months," etc., is not performed by commencing and then indefinitely suspending operations ; but operations begun within the time limited *must be prosecuted in the manner in which the business is ordinarily conducted and with ordinary diligence until the "search for oil is ended,"* either by finding it and operating the territory, or failing to find it and surrendering the possession. *McNish vs. Stone*, 152 Pa., 457 (1879).

Sec. 229. After Obtaining Indications of Success, Lessee Must Proceed or Forfeit.

An oil lease, reserving royalty, provided that lessee should commence drilling a well within a specified time and "prosecute said drilling with due diligence

to success or abandonment ; and should oil or gas not be pumped or excavated in paying quantities on or before June 27, 1886, then this lease to be null and void." A subsequent clause made the violation of any stipulation in the lease a cause of forfeiture. It was *held*: (1) That the drilling could not be regarded as prosecuted to success so long as no actual product of oil or gas was obtained ; and the lessee *after drilling into the oil-bearing rock and finding oil*, was bound to exercise due diligence *in ascertaining whether the oil could be produced in paying quantities*, and, if it could be, in effecting such production. (2) The provision respecting production on or before June 27, 1886, did not give him a discretion to suspend operations indefinitely, after drilling the well, provided he effected such production by the date named ; and, if, *having completed such drilling in December, 1885, he ceased operations for three months thereafter*, making no effort during that period to produce oil, he thereby incurred a forfeiture. *Kennedy vs. Crawford*, 138 Pa., 561 (1890).

Sec. 221. Drill or Pay Rent.

A lessee in an oil lease covenanted to commence operations within sixty days and complete one well on the leased premises within three months thereafter ; in case of failure to complete one well, within such time, he agreed "to pay thereafter as rental to the party of the first part for such delay the sum of \$25 per month until one well shall be completed." The duration of the term was three years, and as long thereafter, etc. It was provided that a failure to perform the contract or any of its conditions should render the lease

null and void, and no longer binding upon either party. Following the forfeiture clause were these words: "He (the lessee) having the option to drill the well or not, or pay said rental or not, as he may elect." *Held*, that the lease did not give the lessee the option to refuse to drill a well or pay a monthly rental if it so pleased him, but that he was bound either to drill the well and so pay no rental, *or* pay the rental and not be compelled to drill the well. *McMillan vs. Phila. Co.*, 159 Pa., 142 (1893).

Per WILLIAMS, J.:

"It is not for the lessor, but it is for the lessee to elect which he will do. This option was deducible from the stipulations of the lease, but the parties chose to put it in words and make it part of the contract. The contention of the defendant destroys the character of the whole contract. It makes the lessee say that he will drill a well within a given time, or, failing to do so, that he will pay a monthly rental, but that he will do neither unless it pleases him, and if he does neither he shall be liable in no manner for his breach of contract. Such a construction is so unjust and absurd that the words relied upon as requiring it must be plain and unambiguous, and must be incapable of an exposition in harmony with the body of the contract before we can consent to adopt it."

Concordant, Jackson vs. O'Hara, 183 Pa., 236 (1897).*

* There is no conflict between *Muhlenberg vs. Henning*, *supra*, and *McMillan vs. Phila. Co.* The terms of the contract governed in each case. In the first, it was for a *royalty* upon ore that did not exist, and the lessee was relieved upon proof of the exercise of reasonable diligence to discover. In the second, it was a penalty for a failure to operate, in the shape of a rental until one well should be completed. The courts construe contracts as they find them. They do not sit, as has been said by the Supreme Court of Pennsylvania, to make contracts.

Sec. 222. When the Number of Wells to be Drilled is Expressed, no Other Number can be Implied.

If the parties to a demise of lands for oil and gas purposes have provided therein, by express terms, how many wells shall be put down, no implication can be raised that any greater number is to be drilled in accordance with a custom for the most effective operations. *Stoddard vs. Emery*, 128 Pa., 436 (1889).

Sec. 223. Obligation on Lessee of Gas Rights less Rigid than upon Lessee of Oil.

A lease, operated for oil production, imposes on the lessee, after ascertaining the existence of oil, the duty of sinking as many wells as may be reasonably necessary, in view of operations on adjoining lands to secure so much of the oil from the land demised as may be obtained with profit.

The duty imposed upon the lessee in a leasehold operated for gas cannot be measured by the same rule applied in the same manner as in the case of a leasehold operated for oil; the peculiar characteristics of the business of producing and transporting natural gas being such as to distinguish it for some purposes from operations for oil. In an action against a lessee who had drilled one paying gas well upon the premises, for not putting down other wells to protect the territory against the effect of operations on adjoining lands, it was error to charge that a failure to drill such wells was a breach of an implied covenant imposing a liability in damages, in the absence of a reasonable excuse therefor. *McKnight vs. Nat. Gas Co.*, 146 Pa., 185 (1892).

See *Glasgow vs. Chartiers Oil Co.*, 152 Pa., 148 (1892): *ante* Sec. 180.

Sec. 224. The Latest Statement of the General Doctrine.

In *Kleppner vs. Lemon*, 176 Pa., 502 (1896), the court gave utterance to the most clearly enunciated views that have up to the present time, been expressed upon the subject, in an opinion by Mr. Justice WILLIAMS, which would seem to be sufficient to set the question at rest. The ruling was as follows :

"It is an implied condition of every lease of land for the production of oil therefrom that when the existence of oil in paying quantities is made apparent the lessee shall put down as many wells as may be reasonably necessary to secure the oil for the common advantage of both lessor and lessee. In determining when and where such wells shall be located, regard must be had to the operations on adjoining lands, and to the well-known fact that a well will drain a territory of much larger extent when the sand rock in which the oil or gas is found is of coarse and loose texture than when it is of fine grain and compact character. Whatever ordinary knowledge and care would dictate as the proper thing to be done for the interests of both lessor and lessee under any given circumstances is that which the law requires to be done as an implied stipulation of the contract.

"A lease conferred on the lessee 'the exclusive right of drilling and operating for petroleum and gas on the plaintiff's land.' If oil and gas were found certain royalties were to be paid. There was no distinct covenant for putting down wells on the land, except that which related to the first or experimental well which was to determine the value of the land for oil purposes. The right to divide the leasehold and to sublet the parts into which it was divided for oil purposes was distinctly reserved by the lessee. The defendant had oil and gas leases on adjoining properties. He put down one well on plaintiff's land and other wells on adjoining lands near to the boundaries of plaintiff's land with the express purpose of securing the oil under plaintiff's lands through these

wells. *Held*: (1) that the lease contemplated the production of the oil underlying the plaintiff's lot by means of operations conducted on its surface; (2) that the number and location of the wells necessary to carry out the purposes of the contract was a subject belonging primarily to the lessee; (3) that in disposing of this question, the lessee was bound to take into consideration the fact that his lessor was the owner of the oil, and to arrange and conduct his efforts to bring it to the surface in such manner as should best protect the interests of both parties to the contract; (4) that he was not bound to put down more wells than were reasonably necessary to obtain the oil of his lessor, nor to put down wells that would not be able to produce oil sufficient to justify the expenditure; (5) that the fact that the oil might be obtained in time through other wells, on the lands of other owners, was not enough to excuse the lessee from his implied undertaking to operate the land for the best interests of both owner and operator.

"In such a case the court may decree on bill in equity filed that unless the defendant shall drill another well within a certain time specified his leasehold estate in said land shall be deemed to be abandoned, except as to the well actually drilled on plaintiff's land, and a certain specified space around it."

Sec. 225. A Similar Ruling where the Stipulation was Express.

The case of *Bradford Oil Co. vs. Blair*, 113 Pa., 83 (1886), was to recover damages for breach of a covenant in a lease, "to continue with due diligence and without delay to prosecute the business to success or abandonment; and, if successful, to prosecute the same, without interruption, for the common benefit of the parties." The court *held* that such an action could be sustained. In *Kleppner vs. Lemon*, there was no such covenant in the lease. Cf. *James vs. Emery Oil Co.*, 1 Penny., 242; *Blair vs. Peck*, 2 Penny., 247.

Sec. 226. After Compliance with Stipulations and Reasonable Test Followed by Finding, but Subsequent Exhaustion of Oil, Lessees not Liable for Rent.

An oil and gas lease stipulated that it was "for the sole and only purpose of drilling and operating wells and storing or transporting oil or gas * * * to have and to hold said premises * * * for and during the full term of twenty years." Further, that if gas should be obtained in sufficient quantities and utilized, \$500 per year should be paid for each and every well drilled; the lessee to complete one well within six months from date of lease; "if oil and gas or neither is found on this property within two years from date, then this lease to expire and be of no effect." The lessees completed a well within six months, found gas and utilized it; subsequently the land became exhausted, and no more gas was produced. *Held*, that the lessees were not liable for rent after the cessation of the production of gas and use of the well. *Williams vs. Guffey*, 178 Pa., 342 (1896). Cf. *Harlan vs. The Lehigh Nav. Co.*, 35 Pa., 293.

Sec. 227. The Ohio Decisions Substantially Similar to those of Pennsylvania.

In *Ohio Oil Co. vs. Harris*, 1 Ohio Nisi Prius R., 132 (1894), the rulings of the Pennsylvania courts upon the obligation of lessees are followed, and the following extract from the opinion of JOHNSON, J., will be of interest.

The especial feature of the case was the danger of drainage of oil and gas through wells on adjoining lands. It was *held* that the lessee was required to drill such number of wells and on such places on the

leased land as would reasonably protect the land from such drainage and exhaust the quantity, though the lease was silent as to the number.

"A careful reading of these decisions convinces me that the claim made by plaintiff's counsel that, where an oil lease is silent as to the number of wells to be put down, therefore the lessor is without remedy, is not tenable. The lessor is *not* without remedy. The lessor (lessee) must fairly and reasonably develop the territory leased and also protect the same from wells on adjoining lands, and in case the lessee fails to do so, a court of equity will take jurisdiction, and, to the extent of the lands on which there are no wells, will declare the lease forfeited and permit the lessor to enter and drill thereon."

Sec. 228.

In the case of *Simon vs. N. W. Ohio N. G. Co.*, 12 Ohio C. C. R., 170 (1896), it was *held*, that, under the various leases and agreements involved, the defendant company should have proceeded to sink wells upon the parcel of land in question within the time fixed in the agreement, and that it had not the right to commence after the expiration of that time.

Sec. 229. Good Faith a Controlling Element.

In *Ohio Oil Co. vs. Kelley*, 9 O. C. C. R., 511 (1895), one John H. Hastings had granted for ten years to the Ohio Oil Company in 1890, in consideration of \$1650 and one-sixth of the oil produced, a tract of land in Hancock County, embracing 165 acres; the instrument further providing that, if only gas were found, a rent of \$300 per year for the product of each well, while the same was being used off the premises, should be paid. All wells were to be drilled within three years. Prior to November 11, 1892, within the

specified time, the oil company drilled seven wells on the premises and paid Hastings his proportion of the product. The oil company, however, was the owner of lands immediately adjoining the 165-acre tract, and drilled a large number of wells, some of them close to the boundary line. Hastings granted to Kelley, in October, 1894, the right to drill eight wells on said tract, they being located not nearer than 600 feet to the seven wells of the oil company. It was argued that a fair and reasonable operation of the tract, within three years and during the term, required the drilling and operation of at least eight additional wells; that it is a custom among operators to the extent of being a rule that, in order to protect the oil under the premises operated, it is absolutely necessary to drill wells close to the boundary lines of the immediate adjoining lands, especially in case the operators of said adjoining lands drill wells close to said boundary lines. Kelley commenced to drill and the oil company attempted to enjoin him; but the court refused the injunction, saying, per SENEY, *J.*:

“If the oil company had attempted in good faith to carry out the spirit, if not the letter, of the contract, it would be in position to pray for the relief they ask at the hands of a court of equity; while, from what we have said and found as the facts, they did not act in good faith.”

After citing the Pennsylvania authorities in point, the court say:

“If the lessee can exercise an arbitrary discretion or option by reason of paying the \$1650, what is the effect? It can say, ‘I will drill no wells,’ or ‘I will drill but one.’ And the oil that is under the 165 acres, instead of coming to the surface on the 165 acres from its transitory character, would come to the surface from the wells of the Ohio Oil Company on its adjacent lands, and thus defeat a part of the consideration for which the right to the 165

acres was granted, and that defeat caused by the act of one of the parties over which the other party had no control."

Nevertheless, in *Baldwin vs. Ohio Oil Co.*, 13 Ohio C. C. R., 519 (1897), the court, in distinguishing the case last cited, said:

"We have never gone so far yet as to adopt a general rule, or hold that the lessee shall work or develop the premises to their fullest capacity. The farthest, I think, we have gone is to hold that the lessee should make some use of the property."

The latest Ohio case in point is that of *Harris vs. Ohio Oil Co.*, Sup. Ct., Ohio, 48 N. E. R., 502 (1897), apparently an appeal from the ruling in Sec. 227, *supra*, in which is expressly recognized the implied covenant on the part of the lessee to drill and operate such a number of wells as would be ordinarily required for the production of oil and to afford ordinary protection to the lines. But, says BURKET, C. J., "the implied covenant arises only when the lease is silent on the subject."

"The extent of the development and number of wells to be drilled, and as to the protection of the lines, is often, if not usually, expressed in the lease, and that is certainly the better practice. When the extent of the development and protection of lines is provided for in the lease, there can be no implied covenant for further development and protection of lines."

Sec. 230. Covenant to Repair Tank.

A company leased a leaking oil tank, made with iron sides and a wooden bottom, the lessee agreeing, in lieu of rent, to put it in "perfectly good repair." *Held*, that this did not require more than putting it in as good condition as it could be made with a wooden bottom. "Repair" means to restore to its former condition, not to change either the form or material. *Ardesco Oil Co. vs. Richardson*, 63 Pa., 162 (1869).

Sec. 231. Lessee Takes Subject to Easement.

Where a continuous and apparent easement or servitude is imposed upon land, a lessee of the servient property, in the absence of an express reservation, takes the property subject to the easement or servitude. *Friend vs. Supply Co.*, 179 Pa., 290 (1897).

Sec. 232. Rent—Obligation Cannot be Avoided by Assignment.

“ Can a lessee voluntarily assign his lease and then set up that assignment as a discharge of his liabilities under the lease? Surely not. In *Frank vs. McGuire*, 42 Pa., 82, Mr. Justice STRONG says: ‘ It surely is not necessary to cite cases to prove that *a tenant is bound by his express contract to pay rent*, even after he had assigned the term with his landlord’s assent, and though the landlord has accepted the assignee as his tenant and received rent from him.’ In *Washington Nat. Gas Co. vs. Johnson*, 123 Pa., 576, it is held that, owing to his privity of contract, a lessee’s liability upon his covenants in an oil and gas lease continues after his assignment of the lease.’ The defendant *knew, or ought to have known*, that the law continued his liability notwithstanding the assignment, and he cannot now set up the failure of his assignees to commence operations under the lease as a defence in this case.”

From opinion of the court below (McILVAINE, P. J.), in *Sanders vs. Sharp*, 153 Pa., 562 (1893). *Affirmed*.

Sec. 233. The Same—Eviction.

If a tenant goes into possession of premises which have already been leased to another person, for oil and gas purposes, and accepts from such lessee a sum of money on account of damages, and contracts with him as to future damages, the tenant cannot defend against the payment of rent upon the ground of an eviction by his landlord. *Horberg vs. May*, 153 Pa., 216 (1893).

Sec. 234. Where Lease Provides for Payment of Rent so Long as Gas is Found on Premises, Lessee Discharged by Inflow of Water.

Under a lease providing for the payment of a specified rental, each year in advance for every well from which gas is used off the premises, so long as gas is found on the premises, the lessee is not liable for the rental upon the failure of the well, or if it become impracticable, *e. g.*, from the inflow of water, to use the gas therefrom. *Gas Co. vs. Teters*, 15 Ind. App., 475 (1896).

Sec. 235. Rent for Gas in Marketable Quantities.

That a lessee of several gas wells under a lease providing that he should pay a certain sum annually for every well as long as it produced gas sufficient to justify marketing, has connected pipes with and sold gas from certain wells, is conclusive as to the right of the lessor to recover the stipulated rent. *Hankey vs. Kramp*, 12 Ohio C. C. R., 95 (1896).

Sec. 236. Cash and Gas Payments.

A recent case, involving rather unusual circumstances, was that of *Kokomo Nat. Gas and Oil Co. vs. Albright*, Ind., 47 N. E. R., 682 (1897). A contract of June 6, 1890, made on a printed blank, stipulated in printing that defendant, a gas company, should have the exclusive right to drill and operate wells on a small plot of plaintiff's land, in consideration whereof the company agreed to furnish gas for four residences, free of charge, as long as gas was obtained on the land in paying quantities, and to pay a well rental of \$200 per annum for each well completed. The provisions in writing stipulated that of the well

rental of \$200 per annum, \$100 should be paid in cash and \$100 in gas; the cash payment to be made annually in advance, beginning on September 1, 1890, "whether a gas well is drilled or not. The gas payment above named begins with this date."

The parties performed the contract for two years according to the written stipulations. *Held*, that both the cash and gas payments were to be made annually, whether a gas well was drilled or not.

Sec. 237. When Notice to be Given to Avoid Entry upon Another Year of Tenancy.

Lessees of an oil lease for twenty-one years, from June 12, 1890, had power to terminate the lease at any time that they found it would not pay them to continue it. They paid \$75 June 12, 1890, and, on June 12, 1891, notified plaintiff that they elected to terminate the lease. *Held*, that, on June 12, 1891, defendants had entered on their second year and were liable for the rent for that year. *Nesbit vs. Godfrey*, 155 Pa., 251 (1893).

Sec. 238. Operations Should be Commenced Within the Time Specified.

A written instrument was duly executed as follows:

" do hereby grant unto second party, his heirs and assigns, the sole right to produce petroleum and natural gas from the following named tract of land: * * * specifically granting to said second party, for and during the term of ninety days from this date, and, as much longer as oil or gas is found, operated or produced in paying quantities, with the exclusive right to drill and operate oil and gas wells."

Held, that the grant expired by its own limitation at the end of ninety days, unless within that time at least one productive well was drilled, and that upon failure to drill one paying well within such time, there was no right to drill thereafter. *Detlor vs. Holland*, Sup. Ct. Ohio, 49 N. E. R., 690 (1898).*

*This is an important case from several standpoints. It follows *Dunham vs. Kirkpatrick*, 101 Pa., 36, in holding that a conveyance of a right to mine "all the iron ore, fire clay and other valuable minerals" does not include petroleum oil and natural gas. It will be considered farther under the head of "Remedies."

CHAPTER IX.

TEST WELLS.

Sec. 239. When Lease Requires, Well Must be Drilled on Demised, Not Neighboring Territory.

A test-well, as the name implies, is a well drilled under the terms of the ordinary lease, for the purpose of ascertaining the existence or non-existence of oil or gas under the demised territory. Where the covenant is explicit, the well must be drilled.

Where parties to the lease stipulate that the test-well shall be sunk upon the land demised, it is no defence to an action to recover the rent that the land was shown, by the exploration of *neighboring territory*, to be dry, and that the sinking of a well would have been a useless expense. *Cochran vs. Pew*, 159 Pa., 184 (1893).

Per MITCHELL, J.:

“The averment in the affidavit of defence that it had been ‘ascertained by methods practiced and approved by men skilled in the business, that neither carbon oil nor gas existed in the land leased,’ and the view, based thereon, urged with so much force by the distinguished counsel, that it must now be accepted as a demonstration of science that putting down a well on land shown by exploration of neighboring territory to be dry, is a useless expense and damage, and that parties in contracting on the subject must be considered to have had this fact in mind, would be a strong argument to the jury, if the case was one for them, that the plaintiff

had suffered no actual damages by the defendant's default. But the conclusive answer in the present case is that the parties have clearly stipulated for the mode in which the trial shall be made, and it is to be by a well on this land. There is no room for science, any more than there is for a jury, to say that it will be of no use to do it; the parties have explicitly agreed on the exact thing to be done, and the exact amount to be paid for failure to do it. The scientific nature of mining in the present day, and the certainty of scientific conclusions from exploration of neighboring territory, may be fully recognized and admitted, but nevertheless, hopeful parties may desire an actual test, and if we are to take notice as counsel suggest, of facts in the history of oil mining we know that some of the most extraordinary and profitable productions have been the result of 'wild-catting' in unpromising fields. But it is enough for us that the parties have contracted for the thing to be done and the damages for not doing it. Under such circumstances it is never open to the covenantor to say that the thing would be of no value to the covenantee if it were done." *Concordant, Carnegie Gas Co. vs. Phil'a. Co.*, 158 Pa., 317 (1893).

Sec. 240. The Same—If Intention Exists Other than the Words Imply, Parties Should so State.

An oil lease provided that a well should be completed within one year, and, in case of failure, a certain sum per annum to be paid by lessee, and if payment was not made, lease to be null and void. A second well was to be completed within two years, and, in case of failure, lessee to pay a certain sum or forfeit the lease. In an action to recover the penalties, defendant filed an affidavit of defence averring that, from drilling wells *in the vicinity*, it was found that there was no oil or gas on the lease, and that therefore no wells had been put down, and that the lease became void and of no effect. *Held*, insufficient. The manifest purpose of the lease was to test the

demised premises by putting down two wells thereon. If it was intended that a test of the leased premises might be made by putting down wells outside thereof, defendant should have protected himself by a stipulation in the lease to that effect. *Gibson vs. Oliver*, 158 Pa., 277 (1893). Applying: *Willis vs. Gas Co.*, 130 Pa., 222 (1890); *Ray vs. Gas Co.*, 138 Pa., 576 (1891); *Springer vs. Gas Co.*, 145 Pa., 430 (1891); *Leatherman vs. Oliver*, 151 Pa., 646 (1892).

To the same effect, *R. R. Co. vs. Egbert*, 152 Pa., 53 (1892).

In this latter case, it was said, *per curiam*:

"The test of surrounding property was not the test required by the lease. It does not follow that because there was no oil on adjoining property, oil might not have been struck on this large tract."

Sec. 241. Kentucky Ruling, *Contra*.

Bell vs. Truit, 9 Bush (Ky.), 257 (1872), seems *contra*—lessee *held* not liable unless it appeared from the evidence that there was *reasonable probability* that lessor would have been benefited.

Sec. 242. Evidence Tending to Show a Misunderstanding of the Law not Admissible.

Another ruling, in *R. R. Co. vs. Egbert*, *supra*, was upon a point not often made. Defendant proposed to prove that, at the time of the execution of the lease, the word "forfeiture" was construed to be absolute by both sides under the early decisions of the Supreme Court and by the profession throughout this "section of the State," and that defendant knew of such construction and acted in accordance with his

knowledge. The Supreme Court overruled the exception, briefly remarking that it was not "competent to show that a number of persons had misunderstood some of the earlier decisions of this court."

Sec. 243. The Reasons for Substantially Similar Rulings Well Expressed by the Supreme Court of Ohio.

In *Cook vs. Andrews*, 36 Ohio, 174 (1880), the action was brought to recover the annual sum of \$150 per year for a series of years, by reason of failure to commence mining coal under a contract. Defendants made the point that the burden of proof was upon the plaintiff as to the existence of minable coal upon the tract leased. But the court overruled the point and placed upon the lessees the burden of proving the *non-existence* of the coal.

Per JOHNSON, J.:

"Unless the lease was abandoned or, in some other way, terminated, the exclusive right to the possession of the premises for the purpose of searching for coal as well as for mining purposes, was vested in the lessees, and it was within their power to prevent any such test by the lessor as would be necessary for him to make, in order to enable him to aver and prove the existence of minable coal, if this burden is upon him.

"In short, the lessees could retain this valuable privilege for twenty years and obstruct the lessor from making the search for coal, without any payment, unless at the termination of the lessees' exclusive right to make the test, the lessor should, at his own expense, make the necessary search to enable him to aver and prove the existence of minable coal.

"It is said the failure to make the test within the time subjected the lessees to an action of damages for breach of this stipulation. Admit this, *but if the burden of proving that there is minable coal on the land is essential to a recovery in the case at bar, it is equally so in such an action*, and, hence the plaintiff would be-

required to do that which the lessees have reserved the exclusive right to do, *i. e.*, *test the land*. Such a construction of this lease would be grossly inequitable and would practically defeat any action, except to recover for coal actually mined, or for rent per annum where the lessees had made the test and found coal, but failed thereafter to mine the same. * * * This contract is anomalous and *evinces great skill in guarding the interests of the lessees*, but we think there is a clear duty imposed on them, when called on for payment of the annual rent stipulated to be paid on failure to mine coal, to show either by an actual test, or by other competent evidence, that, in fact, there was no coal on the premises, in order to defeat a recovery."

The common pleas had rendered a judgment for the plaintiff which the district court reversed. The Supreme Court reversed this judgment and affirmed that of the common pleas.

Sec. 244. Covenant for Test-Well Complied with if Well be Completed, Plugged, and Casing Withdrawn.

An oil and gas lease stipulated that "if second party or their assigns do not commence a test oil or gas well at Rising Sun or vicinity in ninety days, this lease to be void." *Held*, that a test-well having been commenced and completed at that place in ninety days, whereby the existence of oil at that point was ascertained, such performance supplied a sufficient consideration for the contract of lease, even though the test-well was immediately plugged and the casing withdrawn. *Stahl vs. Van Vleck*, 53 Ohio, 136 (1893).

Per BURKET, J., :

"This fully complied with the terms of the contract. The lease did not stipulate for the operation of the well, and the court cannot make a better contract for the plaintiff than he made for himself."

Sec. 245. New York.

The circumstances in *Rice vs. Ege*, U. S. Cir. Ct., N. D. N. Y., 42 Fed. Rep., 661 (1890), were peculiar, and the point under consideration was passed upon from a standpoint different from that involved in the Pennsylvania cases, *supra*.

Upon making division of several oil leases, in which plaintiffs and defendants were jointly interested, plaintiffs took a lease for land which had not been tested for oil and received a written agreement, signed by one defendant in behalf of all the defendants, to pay plaintiffs \$1000 *in case the oil wells on the land transferred to plaintiffs should be unproductive*. The agreement having defined an unproductive well as one in which oil is not produced in paying quantities, evidence that the wells were drilled through the *stratum* in which oil was found, if at all, in that county, at an expense of about \$3000, and only a trace of oil discovered, was held sufficient to show that the wells were unproductive.

Per COXE, *Cir. J.*, (664):

"If the testimony establishes the proposition that the plaintiffs pushed their investigations sufficiently to show that neither the Nelson nor Dodson well was one in which oil could be produced in paying quantities, they are entitled to recover. Their right cannot be defeated by proof that a trace of oil was discovered or even by proof that one of the wells might be made to produce a few barrels, for such production was not sufficient to make it a paying well. The Nelson well was put down 1600 feet. The Dodson well 1377 feet. Oil in Allegheny County is found, if at all, in the third sand. Both of these wells were drilled through the third sand, and little, if any oil, was discovered. Subsequent developments still further demonstrated their unproductiveness. They are surrounded by a circle of dry holes. No oil has been found in their vicinity. The plaintiffs are criticised because the wells 'were not shot, torpedoed

or tubed,' but it would seem that it is not necessary to do this unless the drilling shows some promise of oil. A torpedo may make oil flow more freely, but it will not produce oil from barren sand. There was no possible motive for the plaintiffs to omit anything required to make the wells a success. It was manifestly for their interest that the wells should pay. There is no direct proof as to the amount agreed to be paid for drilling the two wells, but if it were at the rate which the evidence shows was paid for similar wells in Allegheny County, the plaintiffs were obligated to pay nearly \$3000. The comparatively small sum which they were to receive from the defendants in case the wells proved unproductive was no inducement to them to stop the work until every reasonable test had been made. Every incentive was in this direction. If the wells proved successful, it meant a fortune to the plaintiffs. If they failed, it meant a large loss even after the \$1000 had been paid by the defendants. I am satisfied that the plaintiffs did all that the agreement required, and that nothing which they could have done would have developed oil in paying quantities in either of the wells in question."

Sec. 246. Question for Jury.

Where a judgment note was given in payment of a bonus under an oil lease which was endorsed that the same was to be paid in two months "after the year expires on lease No. 1 on the east part of the farm, provided the well in said lease should prove a good paying well, the well to be completed within the year," and there was evidence that the payee agreed that in place of the well contemplated, a test-well should be made on another part of payee's farm within the year and there was evidence that such a well had been drilled within the time and no oil found; *held*, that the case was for the jury, and that a verdict for defendant would be sustained. *Nelson vs. Eachel*, 158 Pa., 372 (1893).

CHAPTER X.

WORKING OUT OF BOUNDS.

Sec. 247. General Doctrine.

It is the duty of a person working near the boundary line of his own mine to take every precaution to avoid encroaching upon adjoining mines; if necessary, surveys should be made. If he takes ore from an adjacent mine, he will be liable for the trespass. The remedy at law is an action of trespass. 15 Am. & Eng. Enc. of Law, 591; Bainbridge M. & M., 610; *Ganter vs. Atkinson*, 35 Wis., 48; *Coal Creek, etc., Min. Co. vs. Moses*, 15 Lea (Tenn.), 300; S. C., 54 Am. Rep., 415.

But there is also a remedy in equity for an accounting. Bainbridge M. & M., 611.

Sec. 248. Rule Not Applicable in Case of Honest Mistake by Lessee from Owner of Two Adjoining Mines.

“Where a party is the lessor of two adjoining mines, the rule governing adjacent mines when held by different owners, that the lessee must ascertain the dividing line at his peril, does not apply, for the lessor having the power to protect himself by covenant, if he neglects to do so, cannot plead rules resulting *ex necessitate rei* as against his own grant.

“2. Where the lessor not only gives his tenant the power, but makes it his duty to explore and mark a theoretical line upon

his own premises, the tenant cannot be treated as a trespasser if, in an honest attempt to ascertain the line, he should chance to pass over it; for the right to do what is necessary in order to find and fix the line, is implied in the grant by which it is made a boundary, and in such a case the lessor can only recover damages for improper mining or criminal negligence." *Freck vs. Locust Mountain Coal Co.*, 86 Pa., 318.

Sec. 249. Conflict in American Decisions.

The American decisions are conflicting, a portion holding that the harsher rule of *Martin vs. Porter*, 5 M. & W., 353, should be followed, even where the trespass occurred by reason of inadvertence or mistake; others adopting the milder rule that, in the absence of fraud, malice or culpable negligence, complete indemnity should be given the party injured, but no punishment to the wrong-doer. 15 Am. & Eng. Cyc. Law, 603.

Among the authorities for the first rule are: *Ill. & St. L. R. & Coal Co. vs. Ogle*, 82 Ill., 627; 92 Ill., 353; *Robertson vs. Jones*, 71 Ill., 405; *McLean Coal Co. vs. Lennon*, 91 Pa., 561; S. C., 33 Am. Rep., 64; *Maye vs. Yappen*, 23 Cal., 306; *Goller vs. Fett*, 30 Cal., 481; *Berlin Coal Co. vs. Cox*, 39 Md., 1; S. C., 17 Am. Rep., 525; *Bennett vs. Thompson*, 13 Ired. (N. Car.), 146.

Among those for the second are: *Forsyth vs. Wells*, 41 Pa., 291 (1861); S. C., 80 Am. Dec., 617; *Kier vs. Peterson*, 41 Pa., 357 (1862); *Lyon vs. Gormley*, 53 Pa., 261 (1866); *Lykens Valley Coal Co. vs. Dock*, 62 Pa., 232 (1869); *Waters vs. Stevenson*, 13 Nev., 157; S. C., 29 Am. Rep., 293; *Cheesman vs. Shreeve*, 40 Fed. Rep., 787 (1889); *Stockbridge Iron Co. vs. Iron Co.*, 102 Mass., 86; *Austin vs. Huntsville Coal & M. Co.*, 72 Mo., 535; S. C., 36 Am. Rep., 770.

The following extract from the charge of PHILLIPS, J., in *Cheesman vs. Shreeve, supra*, may be read with profit :

"It has been insisted by counsel for plaintiffs that, after defendants had knowledge that plaintiffs contested their right to mine within the side lines of plaintiffs' claim, they should have kept the ore there extracted segregated from other ores, so that its exact measurement and valuation could have been more nearly ascertained, and that their failure to do so should be construed most strongly against them. Of course, gentlemen, if you should believe, from the evidence, that this was so—that defendants thereafter mingled the ore taken from within plaintiffs' side lines with other ore, with the purpose of preventing or obstructing the ascertainment of its quantity and value, in willful disregard of of plaintiffs' rights—you would be warranted in construing such conduct against the defendants. If, on the other hand, you should believe that defendants, in the honest belief that they were of right pursuing their vein of ore, and without any design to cover up the quantity or value of ore taken, and in the usual mode of handling and marketing such ore, suffered it to mingle with other ore, or failed to keep it segregated, and that they have presented here the best evidence obtainable by them, of the result of the ore so excavated and shipped, then you should ascertain the approximate value of the ore as best you can, from all the facts before you bearing upon this issue."

Sec. 250. Liberal Interpretation of Lease—Jurisdiction of Equity to Restrain Continuing Trespass.

An interesting case bearing upon this subject is that of *Allison and Evans' Ap.*, 77 Pa., 221 (1875). The lease embraced "a lot of ground containing three acres and one hundred and twenty-three perches of land," and also "a *protection* of ten rods on the east side" of the lot, "and eight rods on the north side", this "protection," as far as the part in dispute was concerned, composing a rectangle on the northeast corner of the lease eighty rods square.

Said the court, page 226, per WILLIAMS, J.:

“If the stipulation in the lease, on which the right to the injunction depends, is to be strictly construed according to the literal meaning of the language, the defendant's well cannot be regarded as within the protection for which it provides, and, if so, the plaintiffs have no legal or equitable right to the relief asked for in the bill. But the agreement must be construed with reference to the subject-matter, and so as to effectuate, if possible, the purpose for which it was intended. The lease was ‘for the sole and only purpose of mining and excavating for petroleum, coal, rock or carbon oil’ in the tract described therein. *The parties probably knew that, if oil was found in the demised premises, a well bored within a short distance would draw off more or less of the oil,* and that for the same reason a well on the border or side of the tract would draw part of its supply from the adjoining ground. The object of the agreement was, therefore, twofold: To prevent the lessor or any one under him from mining or boring wells within eight rods of the north and ten rods of the east line of the tract described in the lease and to give the lessees more ground for the supply of any wells they might drill or bore on the demised premises in proximity to these lines.’

“Is it then a reasonable supposition that the parties intended to leave a gap at the corner where these lines intersect which would render the ‘protection’ valueless and defeat the purpose for which it was intended? The master and the court below were of the opinion that it was the intention of the parties to secure the same protection to the corner as to the sides of the demised tract, and that the agreement should be so construed as to carry out their intention. This, as it seems to us, is its reasonable interpretation; and, if so, the defendants had no right to construct buildings, machinery and to put down a well within a few feet of the corner of the plaintiffs’ leasehold, and pump therefrom, as they did, large quantities of oil. *Nor can there be a doubt that the plaintiffs have a sufficient title to enable them to obtain redress by injunction of the wrong done by the defendants.* The trespass of which they complain is of a permanent nature, and, under the facts found by the master, destructive of their leasehold. It is clear, then, that under the equitable powers conferred by the statute, the court

below had jurisdiction for its prevention or restraint." *Stewart's Appeal*, 56 Pa. St., 413 (1868); *Smith's Ap.*, 69 Pa. St., 474 (1872); *Masson's Ap.*, 70 Pa. St., 26 (1872).

Sec. 251. *Bona Fide Occupant to be Re-imbursed for Cost of Drilling Well.*

If a person while in possession of oil land, believing he has a valid title thereto, in good faith drill an oil well thereon, he has the right, if the land be afterwards recovered from him in ejectment, to retain out of the proceeds of the oil produced during his occupancy a sum sufficient to reimburse him for the cost of drilling the well. *Phillips vs. Coast*, 130 Pa., 572 (1890), the court saying through GREEN, J.:

"This is a kind of improvement of an unusual character and one which particularly commended itself to the favorable opinion of the courts. It was an oil well with all the machinery and appliances necessary to its operation. Now, without this well and machinery, the oil could not possibly be obtained. After it was completed its operations were all for the benefit of the plaintiffs. They have actually received the entire advantage of its structure and maintenance without a penny of cost to themselves and without any risk. All the cost and all the risk were borne by the defendants. * * * Obtaining oil from the bowels of the earth is a very different thing from obtaining crops from the surface of the ground. The oil exists only at a distance of hundreds of feet below the surface. If it is not developed by means of wells, it is the same as if it had no existence at all. It is in a state of nature, of no use or value to the owner of the land. * * * Therefore, it is no hardship to them to repay to the defendants the bare cost of the well and appliances which belong to the plaintiffs now, and the whole benefits of which accrue to them alone. * * * It has cost the plaintiffs nothing, and we know of no good reason, in law or morals, why the reasonable claim of the defendants should not be allowed. * * * It is not a question of staying waste, but of allowance for the cost of valuable improvements actually

necessary and made in good faith. For such improvements compensation is allowed, whether that which is taken be mineral oil or other substances of the land or not. This was fully decided in *Kille vs. Ege*, 82 Pa., 102 (1876), and *Ege vs. Kille*, 84 Pa., 333 (1877)."

Sec. 252. *Bona Fide Occupant Improving the Land Only Required to Make Fair Compensation—Improvements May be Full Compensation.*

In *Morrison vs. Robinson*, 31 Pa., 456 (1858), LOWRIE, C. J., referring to the great variety of decisions upon the general question of compensation, said :

"But these decisions, though various, are not therefore contradictory. Generally they are quite harmonious in their principles. They all recognize that compensation is the purpose of the action, and they allow no more in ordinary cases, even when the occupant knows that he is without title. And if such an occupant changes or improves the property, without objection from the real owner, who knows what is going on, still compensation for the use of the land is all that is allowed, and the permanent improvements may be full compensation. But one who forcibly disseizes another and makes such improvements, or one who makes them after action brought to try the title, can have no claim to have his improvements estimated, because he has no right to choose the mode of improvement of another man's property, against his known will ; and justice will not compensate him at the hazard of doing wrong to the owner.

"It is everywhere admitted that a *bona fide* occupant under claim of title, who makes permanent and valuable improvements, is entitled to have them taken into account in ascertaining whether or not the real owner has sustained any damage, and may show that they are a full compensation for the value of the property. 2 Kent, 535 ; 2 Story's Eq., Sec. 799, 1237 ; 4 Cowen, 168 ; 2 Johns. Cas., 438 ; 6 Watts, 428." Quoting the definition of WASHINGTON, J., in 1 Wheat., 79 :

"A *bona fide* claimant is one who supposes he has a good title and knows of no adverse claim."

Sec. 253. The Same—Mutual Mistake—Lessees Excused from Payment of Royalty, Improvements Being Full Compensation.

In *Mays vs. Dwight*, 82 Pa., 462 (1876), a mutual mistake had occurred between lessors and lessees as to the location of a well; but without knowledge of that fact, lessees entered upon the leasehold and completed the drilling of an unfinished well thereon, obtaining oil from it. Lessees offered, after suit was brought, to surrender possession, but refused to pay the royalty agreed upon in the lease. Upon these facts, the master was of opinion that plaintiffs could not recover for oil obtained from a well situated outside the demised premises, and reported a decree dismissing the bill which had been filed for an account of profits. The lower court sustained the exceptions to the report, but the Supreme Court reversed this decree and dismissed the bill, saying :

"They (the lessors) appeal to the conscience of a chancellor to make an unconscionable decree. For, if we make the decree prayed for, it would not protect the lessees from a suit from the owner of the well for the royalty, and they would be without remedy. It needs no argument to show that these complainants have no equity. We leave them to their remedy at law."

Sec. 254. A More Stringent Rule, Where the Mining is Done on a Trust Estate.

Where the lessee from the trustee of the right to mine coal on certain land makes a payment of a royalty to one of the trustees for mining which was done on the trust estate, but which both he and the trustee supposed was done on the latter's own land, and the payment was understood by both to be made to him in his individual capacity, the lessee is liable to the successor of the trustee for the royalty, and the

payment made cannot be regarded as the royalty due the trust estate. *Ormsby Coal Co. vs. Bestwick*, 129 Pa., 592 (1889).

Sec. 255. Recent Re-Statement of the Law.

One of the latest and most valuable decisions upon this question of the proper measure of damages, and, in addition thereto, the proper remedy, was in the hard-fought case of *Duffield vs. Rosenzweig*, 144 Pa., 520 (1891), it having been heard in the Supreme Court of Pennsylvania four times. The rulings were as follows :

“ 1. Where a lease for oil purposes granted to the lessee a certain tract of land, with the exclusive right of boring for oil thereon, but restricted the operations of the lessee to certain specified sites, the lessee had no such possession as would support ejectment as to land outside the sites designated. *Duffield vs. Hue*, 129 Pa., 94.

“ 2. The lessee, however, had the protection of the entire leasehold ; and equity had jurisdiction to restrain the lessor, or others acting under him, from drilling wells thereon outside the designated sites and thereby lessening the production of the lessee's wells, such injury being without adequate remedy at law. *Duffield vs. Hue*, 136 Pa., 602.

“ 3. But when wells have been drilled on the leasehold outside the sites designated, either by the lessor or by those acting under him under a subsequent lease, the jurisdiction in equity does not oust the jurisdiction at law, and the first lessee may have a remedy at law against the lessor to recover damages actually sustained by him from such drilling.

“ 4. In such case, the damages are not to be measured by the amount of oil taken out of the defendant's wells so drilled, nor by the speculative opinions of operators as to how much of it might have been obtained through the plaintiff's wells, but they may be measured by the difference in value of the plaintiff's leasehold before and after the injury was committed.”

A valuable statement of the law concerning the rights of adjoining land-owners is to be found in the case of *Kelly vs. Ohio Oil Co.*, Ohio, 49 N. E. R., 399 (1897). It was there ruled that whether the oil percolates through the rock or exists in pools or deposits, it forms a part of that tract of real estate in which it tarries for the time being ; and when it leaves one tract and enters another it becomes a part of the realty of the latter and thereby the owner of the former loses all right to the oil while it remains away from his land.

It was further *held* that the drilling of wells by each owner of adjoining oil lands, along and near the division line, so that each may obtain the amount of oil contained in his lands, known as "protecting lines," affords a certain and ample remedy to prevent one operator from obtaining more than his share of oil.

CHAPTER XI.

LIMITATIONS.

Sec. 256.

An interesting feature of the law of oil and gas will be found in the application of the statute of limitations to the rights of the several parties to a lease. A cardinal distinction to be observed is in the differing nature of oil and gas leases, and those of coal or other minerals having a fixed *situs*. A vested title cannot ordinarily be lost by abandonment in a less time than that fixed by the statute, unless there is satisfactory proof of an intention to abandon. But a lease of a right to drill for oil or gas stands on a different ground. The title is inchoate and for purposes of exploration *only until oil or gas is found*. If none be found, the rights of the grantee cease when the explorations are finished ; no estate vests in the lessee, and his title ends upon the abandonment of the search. If oil or gas is found, then the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms of his contract.

Sec. 257. Distinction Between Oil and Coal Leases.

A leased to B the right to mine for oil for twenty years. B entered and drilled unsuccessfully ; plugged the well, and abandoned it. Six or seven years later,

nothing further having been done by B, A leased the same property to C, against whom B and his assignee brought ejectment. *Held*, that there could be no recovery, B's right ceasing when the explorations were finished, and the lot abandoned. *Venture Oil Co. vs. Fretts*, 152 Pa., 451 (1893).

Sec. 258. The Reasons for the Distinction.

Plummer vs. Coal & Iron Co., 160 Pa., 485 (1894), was a coal case, and it was *held* that where there has been a severance in title of the surface from the underlying *stratum* of coal the continued occupancy of the surface by the vendor is not hostile to the title of the owner of the underlying estate and will not give title under the statute of limitations.

And the court distinguishes upon the lines above marked out the two cases last cited, saying :

"The fugitive character of oil and gas and the fact that a single well may drain a considerable territory and bring to the surface oil that when in place in the sand rock was under the lands of adjoining owners, makes it important for each land-owner to test his own land as speedily as possible. Such leases generally require for this reason that operations should begin within a fixed number of days or months and be prosecuted to a successful end or to abandonment. Coal, on the other hand, is fixed in location. * * * There is no necessity for haste nor moving *pari passu* with adjoining owners. The consequence is that coal leases are for a certain fixed term or for all the coal upon the land leased, as the case may be."

Sec. 259. Loyalties.

The statute of limitations would appear not to apply to a suit for royalties. *Williams vs. Short*, 155 Pa., 480 (1893).

The Supreme Court does not rule specifically upon this point, but, upon a refusal of the lower court to charge, *inter alia*, that "it appearing from the evidence that more than six years have elapsed since the alleged right of action accrued and prior to the bringing of this suit, the plaintiff cannot recover," it said: "We see no error that requires us to disturb the judgment, and it is accordingly affirmed." Nor are reasons stated for the ruling by the lower court.

Sec. 260. Trespass upon Oil Lease—Does Statute Run from Date of Trespass or Discovery?

An interesting and important case upon this subject is that of *Lewey vs. Fricke Coke Co.*, 166 Pa., 536 (1895). It concerned coal only, but its principle can readily be extended to other kinds of mining operations. The facts were briefly that the plaintiff was the owner of an acre and a quarter of land underlaid with coal; that the defendant company owned and operated a considerable quantity of coal lands in the neighborhood, adjoining and practically surrounding plaintiff's land; that, in 1884, in the progress of its mining operations, the defendant made an opening or passageway through plaintiff's coal, under one corner of his lot, and that the coal removed therefrom was brought to the surface through defendant's pits or openings on its own lands, and used and disposed of as its own. The plaintiff had no knowledge, and no means of knowledge, until 1891, of the trespass and removal of the coal. In the following year he brought suit, and was met by a plea of the statute of limitations. The court below ruled that the statute began to run in 1884, when the coal was taken. Upon

appeal, this ruling was reversed (MITCHELL, J., dissenting), and the equitable doctrine applied that the statute should run only from discovery, or a time when discovery might have been made.

The opinion of Mr. Justice WILLIAMS should be attentively read. Even with that before us, it is still an open question whether oil and gas operations would be included in its scope, for its *ratio decidendi* is knowledge, or the imputation of knowledge, to the land-owner. Says the opinion (p. 545):

"It seems to be the general doctrine in courts of law, that the plaintiff is bound to know of an invasion of *the surface of his close*. The fact that his land is a forest, and that the defendant goes into its interior to trespass by the cutting of timber, does not relieve against its operation. What is plainly visible he must see at his peril, unless by actual fraud his attention is diverted and his vigilance put to sleep. But ought this rule to extend to a subterranean trespass? The surface is visible and accessible. The owner may know of its condition without trespassing on others, and for that reason he is bound to know. The interior of the earth is invisible and inaccessible to the owner of the surface unless he is engaged in mining operations upon his own land; and then he can reach no part of his own coal *stratum* except that which he is actually removing. If an adjoining land-owner reaches the plaintiff's coal through subterranean ways that reach the surface on his own land and are under his actual control, the vigilance the law requires of the plaintiff upon the surface is powerless to detect the invasion by his neighbor of the coal one hundred feet under the surface."

Under the present processes of operating for oil and gas, it hardly seems possible that a trespass of this kind could be completed without knowledge, or the means of knowledge, on the part of the land-owner that "the surface of his close" had been invaded. The erection of a "rig" or derrick, its connection with the necessary pipe-lines, or the building

of large tanks, would of themselves suffice to convict the proprietor of that "stupidity or negligence" against which the law will not relieve. Upon the point of working out of bounds, the distinction becomes even nicer; but the opinion is submitted that the spirit of the decision could not be successfully invoked, and that the open, uninterrupted and adverse "working" for the required period would be an effectual bar to a claim of title by an owner ignorant of the "overstepping," and that his case would be governed by the ordinary rules. As to notice in fact, Cf. *D. & H. Canal Co. vs. Hughes*, 183 Pa., 66 (1897).

Sec. 261. The Same.

This view is strengthened by the case of the *Scranton Gas & Water Co. vs. Lackawanna Coal & Iron Co.*, 167 Pa., 136 (1895). Plaintiff, a water company, agreed to supply defendant, a coal and iron company, with "pure water" for certain purposes, and other water from a river contaminated by acids, for other purposes. Plaintiff put in the pipes and connections by which the pure water was supplied, and under the agreement had access to defendant's premises for inspection, and also the right to put in water meters. For a period of ten years defendant used "pure water" for purposes other than those contemplated by the agreement, without the knowledge and consent of plaintiff, but without practicing any deception or fraud to divert the attention of plaintiff. *Held*, that the statute of limitations barred plaintiff's right to recover for all water taken prior to six years from the date of the bringing of the suit. A plaintiff is bound to take

by the use of the means of knowledge within his reach, unless his vigilance be relaxed or diverted by the actual fraud of the defendant.

Per WILLIAMS, J.:

“Reduced to its true proportions, the question is thus seen to be whether ignorance of the commission of a trespass will prevent the running of the statute against the owner of the property injured. The trespasser who enters my fields or my uncultivated lands, and takes possession and holds them for the statutory period, acquires title to that which he has taken. He is not required to tell me of his entry, or render an account for the timber he has taken or the profits he has made. He comes upon my land, in the language of the learned judge of the court below, ‘without having any right to do so, and without the knowledge and consent’ of the owner; but at the end of the statutory period he ceases to be a trespasser. My remedy is gone, and my land has gone with it. While I was wholly ignorant of his entry upon my land, the statute has given it to him. The fee simple passes out of me and vests in him without any act of mine and without my knowledge. The cases that so hold are too numerous to justify an attempt at citation. The true reason for this rule was stated in the recent case of *Lewey vs. The Coke Company*, 166 Pa., 536. What an owner might know if he was personally present by himself or his employees on the surface of his possessions, he is bound to know, unless his attention is diverted by the fraudulent artifices of the wrong-doer.”

Sec. 262. Statute Will Not Run against Widow in Favor of Children of Intestate or Their Aliance —Express Trust.

An intestate left him surviving a widow and thirteen children. Three of the children bought the interests of the others in the land and conveyed the same without reservation of their mother's life-estate, and the deed was recorded. Included in his estate were coal lands upon which mines were opened. The

grantees of the coal mined it for many years without the mother making any demand for an account. *Held*, (1) that the grantees of the coal were trustees of the mother's share of the proceeds of the coal, and that they could not plead the statute as a bar to her right to an account; (2) that the mother was entitled to interest for the time that the grantees retained possession of the proceeds of her share of the coal.

Per DEAN, *J.*:

"As to her third, they (the children) were merely trustees for her, and long before lapse of time raised a presumption of payment, she made a legal demand for an accounting. It has been held over and over again, since *Dillebough's Estate*, 4 Watts, 177, that the 'statute of limitations in such a case is out of the question'; that the heir is a trustee as to her thirds; that an alienee of the lands is in no better situation than the heir, and that even the taking of a recognizance or other security of the land in proceedings in partition to protect her interest, is merely a collateral security for her statutory estate." *McGowan vs Bailey*, 179 Pa., 471 (1897).

Sec. 263.

An owner of land who *conveys* the coal under his land to another cannot re-acquire title to the coal by possession of the surface continued for any length of time. Such possession is neither hostile, visible, notorious nor continuous, and is no possession of the coal at all. *Lulay vs. Barnes*, 172 Pa., 331 (1896).

And the principle of this decision would seem just as applicable to oil and gas and not to vary with the "fixed or fugitive" nature of the respective minerals, the single qualification, if such it can be called, being *modus et conventio vincunt legem*.

Sec. 264. Running of the Statute Stopped by Injunction.

Where a party is prevented from performing his contract by injunction wrongfully obtained, he shall, at the end of the litigation, have as much time in which to perform as still remained at the date of the injunction, the rights thereafter to be the same as they would have been in case no injunction had been issued. *Stahl vs. Van Vleck*, 53 Ohio, 136 (1895).

CHAPTER XII.

NATURAL GAS COMPANIES—EMINENT DOMAIN.

Sec. 265. Eminent Domain.

The right of eminent domain is the right of a sovereign State to take private property for public use, in order to promote the general welfare. It is called eminent domain because it is superior to all private rights, and is an exercise of the sovereign authority, which of necessity resides in all governments for the common benefit and welfare of their citizens. It was assumed by the framers of the constitution of Pennsylvania to be a right necessarily inherent in every sovereign State. Accordingly they did not put into the constitution any express grant of such power to the legislature, while they took care to prohibit, by express words, any limitation of its exercise which should exempt corporations from its applications to their property, in common with that of individual persons. Article XVI, Sec. 3, declares: "The exercise of the right of eminent domain shall never be abridged, or so construed as to prevent the general assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals." If this power which resides in the State is a great power, it

cannot be denied that it is also a necessary power. If it may seem in one aspect of it to be a despotic power, it cannot be denied that it is at the same time a beneficent power, and absolutely essential to the public welfare. Without it a road could not be opened, a railroad or telegraph line constructed, a canal dug, a bridge built, a new street laid out or an old one altered, and all public improvements would come to a standstill. It oppresses no one, for its exercise is always accompanied by adequate and full compensation. It is guarded by just restrictions, and its abuse is prevented by adequate limitations. THAYER, J., in *Market Co. vs. R. R. Co.*, 142 Pa., 580 (1891).

Sec. 266. Natural Gas Companies Entitled to the Right.

A natural gas company, being for a public use, may receive the right of eminent domain from the legislature. *Pittsburg's Appeal*, 115 Pa, 4 (1887); *N. G. L. Co. vs. Richardson*, 63 Barb. (N. Y.), 437; *State vs. G. O. & M. Co.*, 120 Ind., 581.

PENNSYLVANIA LEGISLATION.

Sec. 267.

In *Emerson vs. Commonwealth*, 108 Pa. St., 111 (1884), the Supreme Court denied the right of a *natural* gas company to become incorporated under the General Act of April 29, 1874, providing for incorporation for "the *manufacture* and supply of gas, or the supply of light or heat to the public, by any other means," pronouncing natural gas to be "a product of nature, and not the result of any manufact-

uring process. * * * Natural gas is not heat. It is a fuel, a substance which may be converted into heat by combustion with atmospheric air. When gas is delivered to the consumer, it is still gas only. It is not heat. * * * In view of the immense stores of this valuable fuel which have so recently been discovered, and of the great public interest to be subserved by the legal authorization of corporations for supplying it, we think the subject should be brought to the attention of the legislature without delay, so that appropriate legislation may be had."

Accordingly, at the next session of the legislature of Pennsylvania, May 29, 1885, a statute was enacted expressly conferring the powers suggested upon natural gas companies. Sections 1 to 9, inclusive, relate to the formation, general and specific powers, and increase of capital stock; Sections 14 to 20, inclusive, contain miscellaneous provisions, and Sections 21 to 23 relate to the plugging of abandoned wells. That portion of the act especially in point under the above head reads as follows:

Transportation and supply of natural gas declared to be a public use. Right of eminent domain granted.

"SECTION 10. The transportation and supply of natural gas for public consumption is hereby declared to be a public use, and it shall be the duty of corporations, organized or provided for under this act, to furnish to consumers along their lines and within their respective districts, natural gas for heat or light, or other purposes, as the corporation may determine. Any and all corporations that is or are now or shall hereafter be engaged in such business, shall have the right of eminent domain for the laying of pipelines for the transportation and distribution of natural gas; the right, however, shall not be exercised as to any burying-ground or dwelling, passenger railroad, station-house, or any shop or manu-

factory in which steam or fire is necessarily used for manufacturing or repairing purposes, but shall include the right to appropriate land upon or under which to lay said lines and locate pipes upon and over, under and across, any lands, rivers, streams, bridges, roads, streets, lanes, alleys or other public highways, or other pipe-lines, or to cross railroads or canals; *Provided*, In case the pipe-lines cross any railroad operated by steam or canal, the same shall be located under or above such railroad or canal, and in such manner as the railroad or canal company may reasonably direct: *And provided further*, That any company laying a pipe-line under the provisions hereof, shall be liable for all damages occasioned by reason of the negligence of such gas company: *And provided further*, That no company authorized by this act shall have the right to occupy longitudinally the right of way, road-bed, or bridge of any railroad company: *And provided*, If any pipe-line shall be laid under the provisions of this act, or laid upon or over lands cleared and used for agricultural purposes, the same shall be buried at least twenty-four inches below the surface, and if any line of pipe shall be laid over or through any waste or woodland, which shall be changed to farming land, then it shall be the duty of the corporation to immediately bury the said pipe to the depth of at least twenty-four inches, as aforesaid.

“Prior to any appropriation, the corporation shall attempt to agree with the owner as to the damage properly payable for an easement in his or her property, if such owner can be found and is *sui juris*, failing to agree, the corporation shall tender to the property-owner a bond with sufficient sureties to secure him or her in the payment of damages; if the owner refuse to accept said bond or cannot be found, or is not *sui juris*, the same shall then be presented to the court of common pleas of the proper county after reasonable notice to the property-owner by advertisement, or otherwise, to be approved by it. Upon the approval of the bond and its being filed, the right of the corporation to enter upon the enjoyment of its easement shall be complete. Upon petition of either the property-owner or the corporation thereafter, the court of common pleas shall appoint five disinterested freeholders of the county to serve as viewers to assess the damages proper to be paid to the property-owner for the easement appropriated by the company, and shall fix a time for their meeting, of which notice shall be given to both parties.

"Either party may appeal from the report of the viewers within twenty days after the filing thereof to the court of common pleas and have a jury trial as in ordinary cases, and writ of error to the Supreme Court."

Councils of any city may, by ordinance, adopt regulations relative to the right to enter any public street, etc.

"SECTION 11. The right to enter upon any public lane, street, alley or highway for the purpose of laying down pipes, altering, inspecting and repairing the same, shall be exercised in such way as to do as little damage as possible to such highways, and to impair as little as possible the free use thereof, subject to such regulations as the councils of any city may by ordinance adopt."

Disputes between corporations and municipalities to be decided by the court of common pleas.

"SECTION 12. In all cases where any dispute shall arise between such corporations and the authorities of any borough, city, township or county, through, over or upon whose highways, or between it and any land-owner or corporation, through, over or upon whose property or easement, pipes are to be laid, as to the manner of laying the pipes and the character thereof, with respect to safety and public convenience, it shall be the duty of the court of common pleas of the proper county upon the petition of either party to the dispute, upon a hearing to be had, to define by its decree what precautions, if any, shall be taken in the laying of pipes, and, by injunction, to restrain their being laid in any other way than as decreed. It shall be the duty of the court to have the hearing and make its decree with all convenient speed and promptness. Either party shall have a right to appeal therefrom, as in cases of equity to the Supreme Court, but the appeal shall not be a *supersedeas* of the decree, and proceedings shall be had in like manner upon like petition when and as often as any dispute arises as to pipes already laid to define the duty of such corporations as to their relaying, repair, amendment or improvement."

The right to enter boroughs or cities must be had by ordinance duly passed and approved.

“SECTION 13. Companies incorporated under this act and not referred to or included in the next succeeding section hereof, shall not enter upon or lay down their pipes or conduits on any street or highway of any borough or city of this commonwealth, without the assent of the councils of such borough or city by ordinance, duly passed and approved.”

Sec. 268. Companies Must Accept Provisions of Act of 1885 Before Enjoying its Privileges.

A natural gas company incorporated prior to the Pennsylvania Act of 1885, and not having accepted the provisions of that act, and not having begun supplying natural gas within the limits of a borough, cannot, without the consent of the borough authorities, lay its pipes in the streets of the borough. *Phil'a Co. vs. Borough*, 167 Pa., 279 (1895).

Sec. 269.

Almost immediately upon the enactment of the statute, suits were instituted involving its construction and its very life. The responses of the courts to these questions were broad, distinct and well considered. Among the rulings are the following :

“ 1. Natural gas companies, incorporated under the act of May 29, 1885, P. L., 29, providing for the incorporation and regulation of such companies are by said act invested with the rights of eminent domain, and all other powers and privileges, necessary to the convenient and successful prosecution of the business for which they are incorporated.

“ 2. The powers of the councils of cities and boroughs to legislate in regard to natural gas companies are only such as are delegated to them by the act of May 29, 1885, P. L., 29. They are authorized to give or withhold their assent without more. They

have no power to couple their assent with any condition or restriction not imposed by said act, unless the company agrees to accept the same, and be bound thereby; and even then the conditions or restrictions so accepted by the company must harmonize and in no wise conflict with the provisions of said act. The assent of councils being given, the regulations they are authorized to adopt are such only as relate to the manner of laying pipes, altering, inspecting and repairing the sewers, and the character thereof with respect to safety and public convenience. These regulations must also be reasonable and not in conflict with any of the provisions of the act. In all other respects, the power of such companies are clearly defined and their duties and liabilities prescribed by the act under which they are incorporated.

"3. Courts of equity have jurisdiction and power to declare what regulations imposed by councils of cities and boroughs on natural gas companies are illegal, and to restrain said cities or boroughs from enforcing them." *Pittsburg's Appeal*, 115 Pa., 4 (1886).

Sec. 270.

In *Fohnston vs. People's Nat. Gas Co.*, 5 Cent. Rep., 564 (1886), the court, in discussing the subject, said:

"The transportation and supply of natural gas for public consumption is recognized as a public use in Pennsylvania; and the right of eminent domain granted to such corporations by the act of 1885 (Sec. 10) is within the constitutional power of the legislature to grant. It is a curious objection to set up against the act of 1885, in view of the present consumption of natural gas, that its use is not a public one, and that therefore those corporations which are engaged in its transportation may not be vested with the right of eminent domain. As well might this objection be urged against the vesting of this power in those companies which have been incorporated for the purpose of supplying our towns and villages with water, in which the public interest is found not in the transportation, but in the use of that fluid after it has by these agencies been transported. Nor would it seem to us of the slightest materiality that the water thus produced had been

drawn from a simple spring, well or basin. Just so with natural gas; it has become a public necessity, but, as it cannot be used except as it be piped to the manufactories and residences of the people, it follows that, as the piping of it is necessary to its use, the means so used for its transportation must be of prime importance to the public and directly affect its welfare." See, also, *Carothers vs. Philadelphia Co.*, 118 Pa., 468 (1888); Cf. *Mallory vs. City of Bradford*, 1 Dist. R., 670 (1892).

Sec. 271. General Doctrine.

The laying of natural gas pipes in a public highway is an additional burden upon the easement and cannot be done without the payment of damages for the privilege. A court of equity will restrain the laying of such pipe until the damages are assessed and paid. *Sterling's Appeal*, 111 Pa., 35 (1886); *In re Bloomfield, etc., Nat. Gas Light Co.*, 62 N. Y., 386 (1875).

As to streets in a city: *Webb vs. Ohio Gas Fuel Co.*, 16 Weekly L. Bulletin, 121 (C. P. Mahoning Co., 1886); *Lawrence R. R. Co. vs. Williams*, 85 Ohio 168 (1878).

Sec. 272. Gas Companies May Be Compelled to Give Bond to Secure Land-owners.

A court of equity has jurisdiction to compel a natural gas company, about to lay pipes under a sidewalk, to enter a bond to secure the land-owner for the direct injury caused by the disturbed condition of the street and the consequential injury to the land as the condition of the dissolution of a preliminary injunction. *McDevitt vs. People's N. G. Co.*, 160 Pa., 367 (1894).

Sec. 273. Duty to Furnish Gas to All.

A natural gas company, occupying the streets of a town or city with its mains, owes it as a duty to furnish gas to those who own or occupy the houses abutting on such streets, where such owners or occupiers make the necessary arrangements to receive it and comply with the reasonable regulations of such company. *G. & O. Co. vs. State, ex rel. Keen*, 135 Ind., 54 (1893); citing, among other cases, *State vs. Columbus Gas Co.*, 34 Ohio, 72; *Gibbs vs. Consolidated Gas Co.*, 130 U. S., 396; *Williams vs. Gas Co.*, 52 Mich., 499; 2 Beach, Private Corporations, Sec. 835; Cook on Stock and Stockholders, Sec. 674 (2nd Edition); and *mandamus* has been held to be the proper proceeding in such cases. *Portland Nat. Gas Co. vs. State*, 135 Ind., 54. Cf. *Coy vs. Indpls. N. G. Co.*, 146 Ind., 655 (1897).

Sec. 274. The Same. Regulation of Price of Gas Monopoly.

A preliminary injunction will be granted upon a bill, supported by affidavits, alleging that a natural gas company, incorporated under the act of May 29, 1885, after furnishing gas at a reasonable price, with assurance of continuance, secured a monopoly by terms made with competing companies, demanded excessive rates and threatened to shut off the gas unless the increased rates were paid. *Waddington vs. Heating Co., C. P. Ally. Co.*, 36 Pitts. L. J., 96 (1888); S. C., 6 Pa. Co. Ct. R., 96.

The provisions of Section 1 of the act of 1885, declaring the purposes for which the companies may be formed and providing that they may supply the gas

upon such terms and under such reasonable regulations as they shall establish, do not confer exclusive rights and unlimited power to fix rates. *Ibid.*

WHITE, J.:

"To refuse this application is virtually conceding the whole case to defendant company, and acknowledging the right it claims. The plaintiffs, at considerable expense, fitted up their houses for the use of gas under the prices then established, and with assurance that the price of gas would not exceed that of coal. For some two years that was the case. As soon as the defendant company, by terms made with competing companies, secured a monopoly, it notified all consumers that they must pay fifty to one hundred per cent. more, and sign contracts to that effect, or the gas will be shut off. The coal trade has been destroyed; competing companies got out of the way; the plaintiffs cannot get gas, cannot get coal or other fuel without delay, great inconvenience and expense; what shall they do? Must they be compelled, under the press of such circumstances, to sign contracts and be bound hand and foot?

"We cannot now determine whether the increased prices are reasonable or not. * * * Substantial justice can be done to both parties without injury to either, until the cause is fully heard and finally decided, by enjoining the defendant company from shutting off the gas from plaintiffs, by their paying the same rates and in same instalments as heretofore, and giving bond with surety satisfactory to defendant company, or approved by the court, in a sum three times as great as their annual gas bill, to pay whatever increased price, if any, may be finally determined, with the right in defendant company, if an increase is finally allowed, and the arrears of the increase be not paid within thirty days, to shut off the gas, and proceed on the bonds to collect the arrears."

Sec. 275. The Same. Acceptance of Provisions of Ordinance.

Where a borough ordinance provided that the grant of the rights and privileges conferred should be subject to the provisions thereafter named, an acceptance by a gas company of the rights and

privileges will carry with it all the provisions of the ordinance, although the written acceptance may name only one of the sections of the ordinance. *Sewickley Borough vs. Gas Co.*, C. P. Ally. Co., 36 Pitts. L. J., 133 (1888); S. C., 6 Pa. Co. Ct. R., 99.

MAGEE, J. :

"The doctrine is well settled that public corporations are subject to the jurisdiction and control of courts of equity in the exercise of their franchises, and, as public institutions created for the public good, are required to deal with the public on fair and reasonable terms.

"And, as an individual opinion, I am disposed to hold that the price and terms once established, and upon which the consumer has been supplied, are, *prima facie*, the fair and reasonable terms upon which is based the right of the consumer to a continuance of supply, and, if increased prices are demanded for the future, and complained of by the consumer as unjust, unreasonable and excessive, the duty of the court is to restrain the company from cutting off the supply or altering the *status* of the parties, as fixed by the parties themselves, until final decree is reached, at which time the right and obligations of all can be adjusted by the proper money payments to be made for the use of the fuel beyond old rates. This course would seem equitable and just to all parties, because the money payment will furnish compensatory damages to the defendant beyond peradventure, while in the case of the consumer, it is by no means certain that cutting off the gas will only occasion such injury or damage as can be compensated in money payments, or may not contain elements of damage of an irreparable character."

A borough and individuals may be joined in a bill in equity asking for an injunction to restrain a gas company from stopping the supply of gas. *Ibid.*

If the gas has been shut off, the *status quo* will be restored. *Whiteman vs. Fuel Gas Co.*, 139 Pa., 492 (1891); Cf. *Glass Co. vs. Gas Co.*, 137 Pa., 317 (1890).

Sec. 276. Municipalities—Contract as to Other Companies.

Defendant, a natural gas company, in consideration of privileges granted to it by a borough, agreed to furnish gas free of cost to the public buildings and churches of the borough, with the proviso, however, that if similar privileges should be granted to another company, the burden should be decreased *pro rata*, according to the number of the franchises granted. Subsequently similar privileges were granted to another company, and defendant agreed to furnish the school-house and one church with gas, if the second company would furnish the other public buildings and churches. *Held*, on a bill in equity to enjoin defendant from cutting off the supply of gas from the school-house; that the contract was valid and would be enforced in equity. *Sewickley Borough School District vs. Gas Co.*, 154 Pa., 539 (1893).

Sec. 277. Municipal Consent—Pipes in Boroughs.

A natural gas company, operating under a special charter granted prior to the Constitution of Pennsylvania of 1874, without any right of eminent domain provided for it in the charter, and which had never accepted the terms of the act of 1885, has no right to lay its pipe upon the streets of a borough without municipal consent. Such a company, accepting the terms of said act, does not obtain such right without such consent, unless it appear that, prior to the passage of the act, the company had to some extent begun supplying natural gas within such borough, or had laid pipes for that purpose therein. *Phila. Co. vs. Freeport*, 167 Pa., 279 (1895).

Where a corporation has acquired the private right to lay a pipe for the transportation of *oil* through land which is traversed by a public street in a city, the city council may by ordinance prescribe the manner in which the pipe shall be laid and used, and permit the corporation to dig the necessary trench across the street. *Benton vs. City of Elizabeth*, 39 Atl. R., 683 N. J. (1898).

Sec. 278. The Franchise Taken Subject to Existing Borough Provisions.

An ordinance of the borough allowed the gas company to lay pipes through the borough, placing them two and one-half feet below the surface. The right was subject to all ordinances that had been passed or might be passed. Four years before an ordinance had been passed which provided that all pipes should be laid to such depth as required by street commissioner. *Held*, that the gas company was subject to the supervision of the commissioner. *Wilksburg Gas Co. vs. Wilksburg, C. P. Ally. Co.*, 42 Pitts. L. J., 42 (1895).

Sec. 279. Compliance with the Requirements of Statutes Conferring Right of Eminent Domain Enforced.

When a corporation invested with the right of eminent domain enters upon land without a compliance with the requirement that the compensation shall be paid or secured before such entry, trespass will lie, and the right of action vested in the land-owner by the commission of the trespass is not divested by the subsequent tender and approval of security and the institution of proceedings to condemn the land.

But compensation for the permanent injury arising from the appropriation of the land under the

power of eminent domain is to be assessed in the statutory proceeding; and evidence as to the effect of such appropriation upon the market value of the property, a part of which has been taken, is inadmissible upon the trial of an action for the trespass of entering without previous payment or offer of security. *Keil vs. Chartiers V. Gas Co.*, 131 Pa., 466 (1890).

Sec. 280. Injuries to Abutting Property-Owners.

Under the Pennsylvania Act of May 29, 1885, if a natural gas company has obtained the municipal consent to the use of a street, it may lay its pipes under the sidewalks of a street without subjecting itself to liability to abutting property-owners under the condemnation proceedings provided by the act; but, if they have suffered direct injury, they may proceed by action of trespass or upon the company's bond, if any has been given. *McDevitt vs. People's N. G. Co.*, 160 Pa., 367 (1894).

A street in a city is subject to greater servitude in favor of the public than is a road in the open country. *Ibid.*

Especial attention is directed to the case of *Wood vs. McGrath*, 150 Pa., 451 (1892), for a full discussion of the rights of abutting land-owners.

Sec. 281. Penna. Act of May 29, 1885—Right of Direct Action on Bond.

Where a natural gas company, incorporated under the act of May 29, 1885, gave a bond for permission to enter on lands and lay a gas line, the condition being that the obligors should pay "all damages of whatsoever nature and kind that may be suffered or sustained," it recognized obligee's title and

his right to damages, and he may proceed directly upon the bond without a previous assessment by viewers under the act. *Pa. Nat. Gas Co. vs. Cook*, 123 Pa., 170 (1889).

PAXSON, J.:

"There was no need of any statutory proceedings to condemn this property and assess the damages. The defendant company might have proceeded to file a bond in court and have a jury appointed to assess the damages. Instead of doing so, a voluntary bond was tendered to and accepted by the plaintiff, and the company entered at once upon his property and laid their pipes. In doing so, they recognized plaintiff's title and right to damages. * * * That instrument (the bond) covered 'all damages of whatsoever nature and kind that may be suffered or sustained by said Cook.' This is broad enough to embrace all damages allowed by the court. The parties might have stipulated for a narrower rule, but they did not, and we do not sit here to make their contracts for them."

Sec. 282. Act of June 2, 1883—Presumption that Statutory Requirements Will be Observed.

Where a corporation for transporting petroleum by pipe-lines applies for the approval of its bond to a railroad company whose property it crosses, it will be presumed that the crossing will be made as prescribed by the Act of Assembly. *Re Cres. P. L. Co.*, 2 District R. Pa., 93 (1892).

Sec. 283. Revocation.

If an exclusive grant is made, the municipality may subsequently make another grant to another company with impunity, the first grant being beyond the power of a municipality. *Electric L. & P. Co.*, 33 Fed. R., 659 (1888); *Brenhan vs. Water Co.*, 67 Tex., 542 (1887).

Sec. 284. Appropriating Property to Second Public Use.

Section 10 of the Pennsylvania Act of May 29, 1885, confers upon pipe-line companies, in express terms, the right to appropriate land upon or under, and locate pipes upon and over, under and across other pipe-lines, or to cross railroads or canals.

Under the general railroad law, the owner of the soil retains the enjoyment of the fee, subject to the right of way of the railroad. He is entitled, therefore, to drive pipes under the railway for the conveyance of oil or gas, such use being shown not to interfere with or imperil the easement of the railroad company. Interference with such right may be restrained by injunction. *Hasson vs. R. R. Co.* (C. P., Venango Co.), 8 Phila. R., 556 (1871); opinion by TRUNKEY, P. J.

A similar ruling was made, in 1897, by the Supreme Court of Errors and Appeals of New Jersey, in the cases of *Breckenridge vs. R. R. Co.*, and *U. S. Pipe-Line Co. vs. D. L. & W. R. R. Co.*

As stated by the Supreme Court of Indiana in *Steele vs. Empson*, 142 Ind., 397 (1895), the rule that property appropriated to one public use cannot be appropriated to another, applies only when the second will naturally injure or destroy the first. Following *Ry. Co. vs. Anderson*, 139 Ind., 490, and cases there cited; and distinguishing *Valparaiso vs. Ry. Co.*, 123 Ind., 467.

The Supreme Court of West Virginia, in *Wheeling Bridge Co. vs. W. & B. Bridge Co.*, 34 W. Va., 155 (1890), held that one internal improvement company may, in the exercise of its right of eminent domain, take the real estate of another internal improvement

company, in the same manner and generally under the same conditions, that it may take the lands owned by others, *provided* the lands proposed to be taken are not necessary to the enjoyment of its franchise by the defendant company; *nor will any trivial or temporary use by defendant company suffice to protect its land from such condemnation and appropriation.*

Sec. 285. Owners of Coal-Surface Support.

A natural gas company, in the exercise of its right of eminent domain, cannot enter upon the surface, for the purpose of laying a pipe-line, until the owners of the coal beneath the surface have been paid or secured for the easement of surface support bound to be rendered by the corporation to the owners of the coal. *Penna. Gas Coal Co. vs. Versailles, etc., Co.*, 131 Pa., 522 (1890); *Davis vs. Jefferson Gas Co.*, 147 Pa., 130 (1892). See, also, *M'Gregor vs. Gas Co.*, 139 Pa., 230 (1891).

Sec. 286. Compensation.

As to compensating the holder of the fee for laying gas mains under a highway, see *N. G. L. Co. vs. Richardson*, *supra*; *N. G. L. Co. vs. Calkins*, 62 N. Y., 386; *Sterling's Appeal*, 111 Pa., 35 (1886).

Said the court in the case last mentioned :

"Laying and maintaining a pipe-line, at the ordinary depth under the surface, necessarily imposes an additional burden on the land, not contemplated either by the owner or by the public authorities, when the land was appropriated for the purpose of a public road. It is a burden, moreover, which, to some extent, at least, abridges the right of the land-owner in the soil traversed by the road, and hence it is a taking within the meaning of the constitutional provision, requiring just compensation to be made for

property taken, injured or destroyed. (Const., Art. XVI, Sec. 8.) In some cases it is possible the injury may be consequential as well as direct. The constitutional provision embraces both."

Sec. 287. Definition of Just Compensation.

The Pennsylvania Act of 1885 contemplates just compensation. Such compensation consists of the surplus of the damage done to the land, over and above the amount of the special benefits, if any, accruing to the property by reason of the maintenance of the pipe-line upon it. *Fisher vs. Baden Gas Co.*, 138 Pa., 301 (1890.)

Sec. 288. To What Companies Applicable.

The act is applicable to companies engaged in the transportation of natural gas at and before its passage, as well as to those organized for that purpose under its provisions. *Carother's Appeal*, 118 Pa., 468 (1888). See *Johnson's Ap.*, 5 Cent. Rep., 564; *W. Va. Transp. Co. vs. Oil and Coal Co.*, 5 W. Va., 382.

Sec. 289. Property-Owner Entitled to Both Statutory and Common Law Remedy.

A company, entitled to exercise the right of eminent domain, having without tender of bond, or effort to agree as to damages, laid a gas pipe and erected a telephone line along a public road through the land of the plaintiff, who knew of the work but made no effort by bill in equity or otherwise to stop it, cannot be deprived of the easement acquired, but the owner is entitled to a common law action for damages for the injuries sustained. The measure of his damages is the difference between the market value of the land

immediately before the entry and immediately after, as affected by such entry, acts and occupation. *Hankey vs. Philadelphia Company*, 5 Pa. Super. Ct., 148 (1897).

Sec. 290. What Damages Recoverable, and How.

Under this act, a natural gas company which has obtained municipal consent to the use of a street may lay pipes under the sidewalk of the street without subjecting itself to liability for damages to the owners of abutting property, under the condemnation proceedings provided by the act. Such owners can recover only for the direct injury suffered from the disturbed condition of the sidewalk during the laying of the pipes, or the consequential injury due to the proximity of the pipe-line; they must proceed by action of trespass or on the bond of the company, if one has been filed. *McDevitt vs. People's Nat. Gas Co.*, 160 Pa., 367 (1894).

Sec. 291. May be Compelled to Give Bond.

A court of equity has jurisdiction to compel a natural gas company, about to lay pipes under a sidewalk, to enter a bond to secure the land-owner for the direct injury caused by the disturbed condition of the street and the consequential injury to the land, as a condition of the dissolution of a preliminary injunction. *Ibid.* See *Tannehill vs. Phila. Co.*, 2 Pa. Super Ct., 159 (1896).

Sec. 292. Elements of Value—Evidence.

Upon the discovery and marketing of natural gas as a fuel, litigation at once sprang up as to its methods of operation, the laying of its pipe-lines and the injury sustained by land-owners. Nearly all of the following

cases are of this nature and display a practically uniform line of decisions upon the subjects mentioned. Many of them will be found not to have concerned natural gas companies as parties to the record; but the principles of the law of eminent domain enunciated by them will be found, *mutatis mutandis*, to be directly in point.

The following are the leading cases :

In estimating the market value of land taken under right of eminent domain, everything which gives it intrinsic value is a proper element for consideration. And it is competent, therefore, to show that land used as a farm was ripe for building improvements, or for any purpose that enhanced its value. *Wilson vs. Eq. Gas Co.*, 152 Pa., 566 (1893); *Galbraith vs. Phila. Co.*, 2 Pa. Sup. Ct. R., 359 (1896). To the same effect, *Shenango Val. R. R. Co. vs. Braham*, 79 Pa., 447, (1875).

The proper measure is the difference between what the property would bring in the market, before the improvement, and what after the improvement was made, without reference to the purpose for which it may be used. *Cummings vs. Williamsport*, 84 Pa., 472 (1877).

The use is not the test. It is the market value, for any use for which it is available. *Allegheny vs. Black*, 99 Pa. 152 (1881); *P. & S. V. R. R. Co. vs. Cleary*, 125 Pa., 442 (1889); *Schuylkill Ry. Co. vs. Stocker*, 128 Pa., 233 (1889); *Chambers vs. S. Chester Borough*, 140 Pa., 510 (1891).

In *Harris vs. Schuylkill Ry. Co.*, 141 Pa., 242 (1891), it was said by MITCHELL, J., speaking for the court :

“The true test is the difference between the value of the entire lot, as it was immediately before the taking, and the value of what

was left of it after the taking. And in estimating the value of the lot before taking, its possible and probable uses were important elements and might be shown by the evidence of expert witnesses."

The scope of alleged expert testimony in general, and upon questions of damages in condemnation proceedings in particular, was greatly narrowed in *Denniston vs. Phila. Co.*, 1 Pa. Super. Ct. R., 599, where it was *held* that such testimony is properly rejected, when offered as such, in a matter which the witness has not followed and cannot follow as a business, or in that which must necessarily result from observation of a character so general that it must be common to every person.

Sec. 293. Measure of Damages—Expert Testimony.

"Upon a *scire facias sur mortgage*, the witness acquainted with the premises was asked his opinion of the value of the mortgaged premises. The principal reason assigned by the plaintiff against this evidence was that an opinion of the value of land is not evidence, because it is not a fact. It is certain that such opinions are every day received as evidence, although it is true that an opinion is not strictly a fact; and it is difficult to conceive how the value of land can be proved without them. The witness may indeed prove the prices at which other lands in the neighborhood were sold; but that would not ascertain the value of the land in question, without a comparison between it and the land which was sold, as to quality; and quality is very much a matter of opinion. It is a kind of evidence so commonly admitted without dispute or objection that I have no doubt of its legality." *Kellogg vs. Krauser*, 14 S. & R., 142 (1826).

"The measure of damages is to be determined by a comparison of values immediately before and immediately after the taking. To enable a jury to determine this 'they are entitled to the benefit of the opinions of witnesses of skill and judgment, who

have had opportunities to learn the value of the property in question.' " *Brown vs. Corey*, 43 Pa., 495 (1862).

"The market value of land is not a question of science and skill, upon which only an expert can give an opinion. Persons living in the neighborhood may be presumed to have a sufficient knowledge of the market value of the property with the location and character of the land in question. Whether their opinion has any proper ground to rest upon, or is mere conjecture, can be brought out upon cross-examination." *Penna. & N. Y. R. R. Co. vs. Bunnell*, 81 Pa., 426 (1876).

"Though the knowledge of a witness of the value of lands in the neighborhood may have rested solely upon a few purchases made by the railroad company, and from no other sales or purchases in the real estate market, he has some knowledge upon which to base an opinion, and the value of that opinion is for the jury." *Pittsburg & Lake Erie R. R. Co. vs. Robinson*, 95 Pa., 426 (1880).

Sec. 294. Requisites of Expert Testimony.

An essential test of the competency of witnesses called to give an opinion in respect to the market value of land, in condemnation proceedings, is that they shall affirmatively appear to have actual personal knowledge of the facts affecting the subject-matter of the inquiry. Such witnesses should have a sufficient knowledge of the market value of the land estimated upon a fair consideration of the land, the extent and condition of the improvements, its quantity and productive qualities, and the uses to which it may be reasonably applied, taken with the general selling price of lands in the neighborhood at the time. *Michael vs. Cres. Pipe-Line Co.*, 159 Pa., 99 (1893). Followed in *Orr vs. Gas Co.*, 2 Pa. Super. Ct. R., 401 (1896); *Tannehill vs. Gas Co.*, 2 Pa. Super. Ct. R., 159 (1896).

Sec. 295. The Opinion of Well-informed, Reasonable Men, Familiar with the Property, Competent.

The price which, upon full consideration of the matters stated, the judgment of well-informed and reasonable men will approve, may be regarded as the market value. *R. R. Co. vs. Patterson*, 107 Pa., 464 (1884).

"The estimate which a witness may make, it is true, is, in some sense, an opinion, but it is an opinion formed from actual personal knowledge of the facts affecting the subject-matter of the inquiry, and, as a conclusion of fact, is admissible in evidence, from necessity, as the best evidence of which such a question is ordinarily susceptible. In order, therefore, that a witness may be competent to testify intelligently as to the market value of land, he should have some special opportunity for observation; he should, in a general way and to a reasonable extent, have in his mind the data from which a proper estimate of value ought to be made; if interrogated, he should be able to disclose sufficient actual knowledge of the subject to indicate that he is in a condition to know what he proposes to state, and to enable the jury to judge of the probable proximate accuracy of his conclusions. He may hesitate in making an estimate of the value; he may say he does not know certainly, but, after due deliberation, may be able to express an opinion, or come to a conclusion, the accuracy of which, under all the evidence, is, of course, wholly for the jury." *Pittsburg, Virginia & Charleston Ry. Co. vs. Vance*, 115 Pa., 332 (1886).

"Expert testimony is not necessary to determine the value of the property. All persons familiar with the property, who have formed an opinion, are competent to testify as to its value." *Jones vs. R. R. Co.*, 151 Pa., 31 (1892).

"In condemnation proceedings a witness who has known the property for ten or fifteen years and knew of sales of like property in the neighborhood is competent to testify to the market value of the property condemned." *McElheny vs. Bridge Co.*, 153 Pa., 116 (1893).

Sec. 296. The Same.

In an action to recover damages for injury caused by the location and construction of a pipe-line across a farm, a witness is competent to testify as to damages, who has knowledge of the land and of the prices brought by other lands in the neighborhood which had pipe-lines across them. A witness who was not upon the ground when the work was done, is not competent to testify as to *construction* damages caused in the laying of a pipe-line. *Pennock vs. Crescent Pipe-Line Co.*, 170 Pa., 372 (1895).

Sec. 297. The Same.

A witness is competent to testify as to damages caused by the construction of a pipe-line across a farm, where it appears that he lived upon an adjoining farm and knew the one in question fifty years, the character and productiveness of its soil, the kind and quality of the improvements on it, its water supply, the prices at which neighborhood lands were held, and the prices at which they had been sold prior to the construction of the pipe-line, and up to within six months of the trial. But one who has never seen the property, nor even been in its neighborhood, and knew of but one sale in the neighborhood, is not competent for that purpose. *T. F. Mewes vs. Crescent Pipe-Line Co.*, 170 Pa., 364 (1895).

Sec. 298. The Same.

In the case of *J. E. Mewes vs. Crescent Pipe-Line Co.*, reported at page 369 of the same volume, substantially the same ruling was made; and it was further *held* that it is not improper for the court to

refuse to charge, in an action to recover damages for the construction of a pipe-line, that greater weight is to be given to the testimony of those who have knowledge and observation of several sales of land upon which pipe-lines had been constructed, than to a witness who had knowledge of but one such sale. The question in such a case is one for the determination of the jury, under all the evidence, and the credibility they may attach to the testimony of the respective witnesses.

Sec. 299. Evidence—Special Damage.

Evidence of special damage in the laying of a pipe-line, such as the inconvenience caused by the erection of box-valves at the intersection of two lines, is admissible. *McMillan vs. Phil'a Co.*, 1 Pa. Super. Ct., 648 (1896).

Sec. 300. Value for Special Purpose.

But an estimate of the value of land taken for a public use should not be based upon the adaptation of the land to a special purpose, in the absence of anything to show a reasonable expectation of some demand at some time for the use of the land for that purpose. *U. S. vs. Seufert*, C. C. Dist., Oreg., 78 Fed. R., 520 (1897); *U. S. vs. Taffe*, C. C. Dist., Oreg., 78 Fed. R., 524; distinguishing, *Boom Co. vs. Patterson*, 98 U. S. R., 403 (1878).

Sec. 301. Evidence—Location of Line of Property.

In an action for damages, arising from increased servitude imposed by laying a pipe-line in a public road, of which the plaintiff held the fee, the plaintiff

may give evidence of the proximity of the pipe-line to a drain leading to the cellar of his house, the declared purpose being "to show the exact location of the pipe-line and of the property." *Tannehill vs. Phil'a Co.*, 2 Pa. Super. Ct. R., 159 (1896).

Sec. 302. Evidence of Particular Sales not Admissible.

In the assessment of damages for land taken or injured in the exercise of the right of eminent domain, the market value of the property, before and after the injury, cannot be ascertained by evidence of particular sales, under special circumstances, of other properties alleged to be similarly situated. But a farmer, living a few miles distant, who has known a farm for forty years, seeing the greater part of it in passing and re-passing upon the public road, has been upon it, and at the buildings, and knows the general selling price of lands in the neighborhood, is a competent witness as to market value, under the test laid down in *Ry. Co. vs. Vance*, 115 Pa., 331. *Curtin vs. R. R. Co.*, 135 Pa., 20 (1890); *R. R. Co. vs. Patterson*, 107 Pa., 461 (1885).

Sec. 303. Price Demanded by Plaintiff Admissible.

Under the general rule of evidence that everything said or done by a party, touching the matter in issue, may be presented in evidence against him, it is admissible to show in a damage case, for taking the right of way for a pipe-line, the price, *apart from any purpose of compromise*, demanded by plaintiff. *Orr vs. Gas Co.*, 2 Pa. Super. Ct. R., 401 (1896).

Sec. 304. The Nature of the Injuries That May Be Considered.

The inconvenience and injury caused by the location of a properly constructed and carefully operated gas-pipe-line may be considered *in a proceeding for the assessment of damages* to the land through which it passes, but such as are produced by the negligent construction and operation of the pipe-line cannot be considered. *Denniston vs. Phil'a Co.*, 161 Pa., 41 (1894); *Same vs. Same*, 1 Pa. Super. Ct. R., 601 (1896).

Sec. 305. Value of Properties Similarly Situated Only Admissible Upon Cross-Examination.

The market value, as a measure of damages for land taken or injured by a railroad company, cannot be ascertained by evidence of particular sales of other properties alleged to be similarly situated to the one in question, as such evidence would introduce collateral issues. Such evidence may, however, be brought out by the cross-examination of witnesses. *Becker vs. R. R. Co.*, 177 Pa., 252 (1896); following *Klages vs. R. R.*, 160 Pa., 386 (1894).

Sec. 306. Conclusion.

The discussion of the subject, so far as the Pennsylvania decisions are concerned, may well be closed with the examination of three recent cases, in which it is given most careful consideration.

The case of *Galbraith vs. Phil'a Co.*, 2 Pa. Super. Ct. R., 359 (1896), contains a useful summary of the decisions of the Supreme Court. It contains rulings upon the competency of various witnesses introduced, *e. g.*, accepting one who had lived for fifty-one

years within one-half mile of the property, was well acquainted with the land, knew of the construction of the pipe-line and knew of sales of lands in the neighborhood, and another who testified that he had as good an idea of land in the county as the general farmer, and that he had examined the land as a viewer ; and excluding the testimony of an expert called for the purpose of showing the probable lasting qualities of the gas fields in the county where the land is situated, when there was no offer to show how the witness proposed to demonstrate the truth of his theory.

Sec. 307.

The second case is *Clements vs. Phil'a Co.*, 3 Pa. Super. Ct. R., 14 (1896). In an opinion delivered by SMITH, J., the following summary of the law is made :

" 1. Under the constitution, the injury for which a recovery may be had must be such as would be actionable at common law.

" 2. The injury must be the natural and probable result of the construction, enlargement or operation of the corporate works.

" 3. It must be of such certain character that the damages therefor can be ascertained and paid, or secured in advance.

" 4. A merely possible injury in the future cannot form the basis of a claim for damages under the constitution or the statute.

" 5. The measure of damages is 'just compensation' to the land-owner, which must be ascertained by a comparison of the value of the property as a whole immediately before, and its value immediately after, the construction, as affected by the easement, the same as in other cases.

" In actions under the act of May 29, 1885, P. L. 29, for the taking of an easement by a gas company, injuries which may be apprehended only as possible, from the removal of the pipes upon the abandonment of the easement, cannot be considered in the assessment of damages by the viewers, but, when actually occurring, form an independent cause of action, and the corporation is liable for all such injuries, whether necessary or unnecessary.

“The abandonment of an easement, for a pipe-line, imports a permanent non-user of the rights embraced in it. It does not necessarily imply an abandonment or removal of the appliances through which such easement is enjoyed. Such removal is not an enjoyment of the easement, but an act following its abandonment, and is not the exercise of a right acquired under the proceedings by which the easement is acquired, but a vested property right existing independently thereof, and it follows that there can be no claim under the statute for injuries apprehended from its exercise.”

This case was carried to the Supreme Court of Pennsylvania and reversed upon the fifth point. It was *held* that the company, having acquired the right to lay its pipe-line over plaintiff's land, had the right to enter and remove the same; that such right of entry did not authorize the doing of any substantial injury to the owners, beyond the burying or removal of the pipe in the best way practicable, but that *the measure of damages was the extent of the injury done by the removal of the pipes at an improper time, or in an improper manner*. If, because of the exercise of a right of entry incident to the easement, growing crops were disturbed, it was *damnum absque injuria* as to the surface necessarily occupied for the purposes for which the entry was *properly* made.

Said WILLIAMS, J. :

“An entry for the purposes of removal stands, however, upon somewhat different grounds. It is not made because of the necessities of transportation, but because they no longer exist. It is, therefore, the duty of the company to make the removal at the time and in the manner best adapted to the purpose, and least harmful to the land-owner. It is the duty of the company, upon a surrender of its easement, to fill the trench it has opened so far as substantially to restore the surface of the land, and its failure to do so is just ground of complaint. It should make compensation for any actual injury to growing grain or grass, and, if the field be in

meadow, for any substantial injury to the turf, beyond the mere opening and filling of the trench in which the pipe lay. Subject, however, to the limitations now indicated, it has the right to enter and remove its pipe without being liable as a trespasser therefor. The judgment is reversed that the proper measure of damages may be given to the jury." *Clements vs. Philadelphia Co.*, 184 Pa., 628 38 Atl. R., 1090 (1898).

Sec. 308.

The third case is that of *Swank vs. Carnegie N. G. Co.*, 5 Super. Ct. R., 371 (1897). The question was as to the competency of a witness who lived within twelve miles of the property taken, and testified that he knew the value of farms in the vicinity from information received from persons living in that neighborhood, and from his general knowledge as a farmer, and, who, after having been subpoenaed, went upon the land and examined the injury resulting from the taking. It was *held* that the witness was competent as an expert, the judgment being based principally upon *Struthers vs. R. R. Co.*, 174 Pa., 291.

Sec. 309. Interest on Damages.

Interest, as such, cannot be allowed upon damages, but if there have been additional damages, because of the lapse of time, the jury may add it to the amount of the verdict. But it is certainly a question for the jury. *Becker vs. R. R.*, *supra*.

Sec. 310. Damages Not Limited by Bond.

Damages in condemnation proceedings in Pennsylvania are not limited by the amount of the bond given by the company seeking to condemn the land, as Art. XVI, Sec. 8 of the Constitution provides that

the amount on appeal from assessments shall be determined by a jury according to the course of the common law. *Michael vs. Cres. Pipe-Line Co., supra.*

Sec. 311. Profits of Mineral Lands.

In *Searle vs. R. R. Co.*, 33 Pa., 57 (1859), it was held that damages for the value of the coal lying under the surface of the ground, taken for a railroad, could not be allowed, and that the measure of damages must be the actual value of the land taken, and not the loss of profit which might be made by taking the mineral underneath it. And an offer to prove that there was \$4000 worth of coal under the land was rejected, LOWRIE, C. J., saying :

“ We do not measure the value of land by such facts. Land may have \$4000 worth of coal per acre in it and yet sell at \$40.00 per acre. * * * Moreover, the offer impliedly requires a degree of refinement in the measure of values, which seems to us totally incompatible with the gross estimates of common life. * * * *The gross estimates of common life are all that courts and juries have skill enough to use as a measure of value. All other measures are necessarily arbitrary and fanciful.*” See also *R. R. vs. Patterson*, 107 Pa., 461 (1884); *R. R. vs. Eby*, 107 Pa., 166 (1884).

Sec. 312.

In *R. R. Co. vs. Balthasar*, 119 Pa., 472 (1888), the value of plaintiff's land as *limestone land* was held to be a proper subject for consideration, *but not the value of the stone under the road*. And, in *Davis vs. Jefferson Gas Co.*, 147 Pa., 130 (1892), it was held that where there exists a *stratum* of coal under the land entered upon, the loss in value to the tract, by reason of the appropriation of part of the coal to the support of the surface, is a proper subject for compensation.

Sec. 313. Value—Potentialities of Improvements.

But owners may claim for land taken under condemnation proceedings, and for potentialities of improvements—*e. g.*, for the appropriation of ways and easements appurtenant. *Phillips vs. Inclined Plane Co.*, 166 Pa., 21 (1895).

Owners may claim successfully, also, consequential damages—*e. g.*, not only for the land actually taken, but for the depreciation in the value of the remainder of the lot. *Comstock vs. Ry. Co.*, 169 Pa., 582 (1895).

And under the provisions of a bond covering "all damages of whatsoever nature or kind that may be suffered or sustained," the obligee was *held* to be entitled to recover for consequential injuries in a loss of local trade, resulting from the enforced removal of his business. *Gas Co. vs. Cook*, 123 Pa., 170 (1889).

Sec. 314. Damages for Negligence in Operating, Not Recoverable in Condemnation Proceedings.

Gas companies in Pennsylvania are expressly made liable by the act of May 29, 1885, for negligence in the operation of their lines; but it would be both illegal and unjust to permit a recovery of damages, due to such negligence, to be had in a suit to recover for the assessment of damages for the taking. *Denniston vs. Phil'a Co.*, 1 Pa. Super. Ct. R., 599 (1896). But they may be recovered in an action on the case.

Sec. 315. Probable Future Losses by Fire and Explosions.

Damages cannot be allowed, in proceedings to condemn land for laying pipes to convey natural gas, for probable future losses by fire and explosions, as

independent items, disconnected from the diminished value of the land. *Gas & Oil Co. vs. Jones*, 14 Ind. App., 55 (1895).

Citing Lewis, Em. Dom. Sec. 497 :

“ It is to be borne in mind that compensation is not to be given for increased exposure to fire, nor for increased insurance rates, nor for probable losses by fire in the future, for which no recovery can be had, but simply for *depreciation in the value of the property by reason of the danger from fire.*”

Sec. 316. View by Jury.

Where, upon the trial of an issue to assess damages to land arising from the construction of a railroad, the jury are sent to view the land, the purpose of the view is to enable them the better to understand the testimony, and not that they should make up their verdict from the view in disregard of the evidence adduced. *Flower vs. R. R. Co.*, 133 Pa., 524 (1890). Explaining *Hartman vs. R. R. Co.*, 22 W. N. C., 84.

Sec. 317. Limitations.

Where, in an equity suit by a railroad company against a city, it is decreed that a street shall be carried across the railroad tracks by bridges and viaducts ; the right of action of a property-owner on the street is complete not later than the time when the work has progressed to such an extent as to obstruct ingress and egress to and from his property to the street ; and, if he permits six years to expire after that time before bringing suit, his claim will be barred. *Cass vs. Penna. Co.*, 159 Pa., 273 (1893).

Sec. 318. Discontinuance of Proceedings.

Where there has been such an actual taking under the power of eminent domain as invests the donee of the power with title, and gives to the landowner a vested right of compensation, the former cannot be allowed to discontinue the condemnation proceedings without the consent of the latter. *Wood vs. Hospital*, 164 Pa., 159 (1894), *STERRETT, J.* :

"If, in the face of their unequivocal acts and declarations, defendants had a right to discontinue and had been permitted to do so, there would have been nothing to prevent them from inaugurating new proceedings, and in like manner withdrawing therefrom ; and thus they might commence and abandon new proceedings from time to time with the view of obtaining an award that would be satisfactory to themselves. Corporations and others invested with the power of eminent domain should not be permitted to thus experiment with judicial proceedings for any such purpose."

Sec. 319. Ohio Rules.

In *Cincinnati vs. Neff*, 20 Bulletin (Ohio), 8, the following general rules were laid down :

"The owner is entitled to the fair and reasonable but full value ascertained by the evidence of experts.

"Rental derived with such regularity as to make a continuance probable is a valuable test, taking into account the probable life of buildings and depreciation affecting rent, and considering the rent of all so as to eliminate inequality by variance in rent charges.

"Enhancement in values by the prospect of improvement must be allowed the owner.

"Buildings are not to be valued as old material, but as if they were to remain in use on the lot.

"Lessees are entitled so far as the value or rent for the term exceeds the ground rent, keeping in mind the covenants to repair, etc.

"(But oil and gas lessees need not be made parties to the proceedings, though they will be protected. *Ohio Oil Co. vs. Toledo*, 4 C. C., 127.)

"Movable fixtures are to be valued by the difference in value where they are and elsewhere.

"Probabilities are not to be considered, except as affecting present values.

"The burden to establish values is on the owner."

Sec. 320. Possible Uses Can Be Shown.

If the land taken is severed from other land of the party, not only its abstract value, but also its relative value, and the effect of the severance on the residue, and also the uses for which it is taken, are to be considered. *C. & P. R. R. vs. Ball*, 5 Ohio St., 568; *Goodwin vs. Canal Co.*, 18 Ohio St., 169; *Ry. Co. vs. Longworth*, 30 Ohio St., 108.

In *Miami Coal Co. vs. Wigton*, 19 Ohio St., 560, the power of mining companies organized under general laws of Ohio, authorized to construct a railroad from their mines to another railroad, to condemn private property, was denied.

Sec. 321. Pipe-Line on Highways Additional Burden on the Fee.

The building of a pipe-line for gas or oil along a highway is an additional burden *upon the fee*, for which compensation must be made to the owner. *Sterling's Appeal*, 111 Pa., 45 (1886).

Pipes for natural gas for fuel, as distinguished from lighting, are an additional servitude to the owner of the fee, but not to one owning only to the street line, except where a proper method of joining pipes to prevent leakage is adopted. *Webb vs. Gas Fuel Co.*, 116 B. (Ohio), 121; *Gas Trust Co. vs. Huntsinger*, 14 Ind. App., 156 (1895); *Kincaid vs. Indianapolis, &c., Gas Co.*, 124 Ind., 577 (1890), and Indiana cases cited.

There is an essential distinction between urban and suburban highways, and the rights of abutters are much more limited in the case of urban streets than in the case of suburban ways. *Kincaid vs. Gas Co., supra.*

Sec. 322. Mortgagee Takes Subject to Rights of the Public.

As the purchaser of real estate takes the property subject to the implied paramount right of the public, so the mortgagee takes his mortgage with notice of such paramount right, and must submit to its subsequent exercise. *Murphy vs. Beard*, 138 Ind., 560 (1894); following *State, ex rel., etc. vs. Ins. Co.*, 117 Ind., 251 :

“ We have no doubt that it would have been within the power of the legislature to provide by express words that the lien should have priority over the pre-existing mortgages.” *Provident Institution vs. Jersey City*, 113 U. S., 506. And *Pierce vs. Ins. Co.*, 131 Ind., 284.

“ The law which gives to the last maritime liens priority over earlier liens in point of time is based on principles of acknowledged justice. That which is given for the preservation or betterment of the common pledge is in natural equity fairly entitled to the first rank in the table of claims. Mechanics lien law stand on the same basis of natural justice.” *Provident Institution vs. Jersey City, supra.*

Sec. 323. Diversion to Other Use.

Where, pursuant to legislation, land is appropriated to an important public use, it cannot afterwards be taken for a use wholly inconsistent and different from the first, unless such appears, by express words or necessary implication, to be the intent of the legislature. *Ft. Wayne vs. Ry. Co.*, 132 Ind., 558 (1892); citing *R. R. Co. vs. Dayton*, 23 Ohio St., 510; *R. R. Co. vs. Brownell*, 24 N. Y., 345.

Sec. 324. Constitutional Law—Local and General Law.

The Indiana natural gas law of 1889 is not subject to the objection that it is local or special. A law which applies generally to a particular class of cases is not a local or special law. The constitution does not require that the operation of a law shall be uniform, other than that the operation shall be the same in all parts of the State under the same circumstances. *Consumers' Gas Trust Co. vs. Harless*, 131 Ind., 446 (1892).

Sec. 325. Lessee May Sue in Lessor's Name for Breach of Covenant.

Where a railroad company has the right of way over mining lands, and covenants with the owner thereof that, upon notice, it will change its location, or permit the coal underneath the way to be mined, a tenant of such owner, the terms of whose lease give him the right to mine all the coal in the land demised, may sue in the name of the landlord for the breach of such covenant. *R. R. Co. vs. Lippincott*, 86 Pa., 468 (1878).

Sec. 326. Lease of Property Pending Condemnation Proceedings.

One who takes a lease pending proceedings for the condemnation of the property has no claim for damages against the body maintaining the proceedings. But his interest is terminated by the proceedings, and he is entitled to its value out of the damages awarded the lessor. *Chicago vs. Messler*, U. S. Cir. Ct., N. D. Ill., 38 Fed. Rep., 302 (1889).

Sec. 327. Collateral Attack—Jurisdiction.

A judgment of condemnation of land rendered by a court having jurisdiction over the parties, and power to condemn land in proper cases, is not subject to collateral attack on the ground that it was rendered in favor of a party who had not the legal capacity to condemn land, since that is a matter to be determined by court rendering the judgment. *Foltz vs. Ry. Co.*, Cir. Ct. Ap., 8th Cir., 60 Fed. Rep., 316 (1894).

Per SANBORN, *Cir. Judge*:

"Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action, but it includes every issue within the scope of the general power vested in the court, by the law of its organization, to deal with the abstract question. Nor is this jurisdiction limited to making correct decisions. It empowers the court to determine every issue within the scope of its authority according to its own view of the law and the evidence, whether its decision is right or wrong, and every judgment or decision so rendered is final and conclusive upon the parties to it, unless reversed by writ of error or appeal, or impeached for fraud."

And on page 321:

"No case has been called to our attention in which it has been held that a judgment of condemnation of land, in favor of a party who had not the legal capacity to exercise the power of eminent domain, was a nullity."

The *legality of the incorporation* of a regularly incorporated company cannot be questioned in a merely collateral suit affecting the rights of the corporation. *Market Co. vs. Railroad*, 142 Pa., 580 (1891); Cf. *Sterling's Ap.*, 111 Pa., 35; *supra*.

Sec. 328. Remedy.

In the case last mentioned the court said :

“There is nothing in the suggestion that appellant has a full, complete, and adequate remedy at law. The injury complained of is one of a continuing and permanent nature, for which an action at law would not afford a complete and adequate remedy. (*Com. vs. R. R. Co.*, 12 Harris, 159.) The appellee is, or claims to be, a corporation, and they are peculiarly the subjects of equitable jurisdiction and control, especially when they attempt to exceed their corporate powers.”

Held, further, that under the act of June 29, 1871, an inquiry as to *whether certain powers are or are not granted by a charter* may be made in a collateral proceeding, the statute providing that :

“In *all* proceedings in courts of law or equity of this commonwealth, in which it is alleged that the private rights of individuals, or the rights or franchises of other corporations are injured or invaded by any corporation claiming to have a right or franchise to do the act from which the injury results, it shall be the duty of the court in which such proceedings are had to examine, inquire and ascertain whether such corporation does in fact possess the right or franchise to do the act from which such alleged injury * * * results, and if such rights or franchises have not been conferred upon such corporations, such courts, if exercising equitable power, shall by injunction, at the suit of the private parties or other corporations, restrain such injurious acts. And if the proceedings be at law, for damages, it shall be lawful therein to recover damages for such injury as in other cases.”

Sec. 329. Pipe-Line Companies are Transporters of Freight.

A statute of Pennsylvania (April 24, 1874 ; P. L., 70, Sec. 24), provided that “every railroad company, coal company, steamboat company, slack-water navigation company, transportation company, street passenger company, and every other company now or

hereafter incorporated by or under any law of this commonwealth," operating "any railroad, canal, slack-water navigation or street passenger railway, *or device for the transportation of freight or passengers*," should be subject to pay into the State treasury a certain tax. Under this law a petroleum company, conveying oil from wells to tanks and reservoirs by means of pipes, was held liable to the tax as a "transportation company" transporting freight. *Columbia Conduit Co. vs. Commonwealth*, 90 Pa., 307.

Sec. 330. Natural Gas and Pipe-Line Companies Common Carriers.

A pipe-line company is a common carrier bound to receive and transport, for all persons alike, all goods intrusted to its care, and is not in any sense to be deemed an agent for the persons committing oil to its care, with power either to affect by its acts or declarations the rights of customers or to conserve the litigated claims or rights of customers as between them and other persons.

Sec. 331. Injuries from Corporations Duly Authorized to Operate, *Damnum Absque Injuria* if without Negligence.

Where a corporation is clothed with the right of eminent domain and is expressly authorized by law to construct its works and operate them, any injury resulting from such operation *without negligence* and *without malice* is *damnum absque injuria*; but, where a corporation has no right of eminent domain, the operation of its works, causing consequential injuries to another, is a nuisance.

Sec. 332. Grant of Exclusive Use of Streets by Gas Pipe-Line Companies—General Doctrine.

"As a result of many authorities upon this subject, it may be stated that a town or city, without power expressly conferred upon it by statute, cannot grant to a natural or artificial gas company, or one incorporated to furnish water, the right to an exclusive use of its streets for the purpose of laying pipes therein and supplying the inhabitants with gas or water; and if it does do so, it may without danger of liability, disregard the grant and give other and similar companies such privileges. If the town or city is empowered by statute to grant such an exclusive privilege and the privilege or use is accepted by the company and expenditures are made in pursuance thereof, the grant becomes a contract which cannot be revoked, either by the city or the legislature." W. W. Thornton, *Am. Law Reg.*, Feb., 1890, 115. Citing, among other authorities, 2 Dill. *Mun. Corp.* (3d Edition), Sec. 693; *Indianapolis vs. Gas Light Co.*, 66 Ind., 396; *Gas Light Co. vs. Norwich City G. L. Co.*, 25 Conn., 19; *State vs. Gas Co.*, 34 Ohio, 572; *State vs. Gas Light Co.*, 29 Wis., 454; *Garrison vs. Chicago*, 7 Biss., 450; *G. L. Co. vs. Middletown*, 59 N. Y., 228; *Meadville F. G. Co. vs. Nat. Gas Co.*, 3d Central Rep., 921.

Sec. 333. Pipe-Line Companies — Right of Way—Exclusive Use.

In *W. Va. Transp. Co. vs. Ohio River Pipe-Line Co.*, 22 W. Va., 600 (1885), the grant of an exclusive use of a tract of land for a pipe and telegraph line was held to be void as contrary to public policy and imposing an unreasonable restraint upon trade by preventing others from transporting oil from or through the land.

As a general rule, any trade or business may legally have imposed on it by contract a partial restraint, as to the extent of territory over which it is permitted to extend. Such restraint when valid, varies with the character of the trade or business. In

some cases, it may be a large extent of country in which a party may contract not to carry on his business; but, in other sorts of business, the restraint would not be valid if it were attempted by the contract to extend it beyond the bounds of a single town; and there are some sorts of business which the law will not allow to be restricted at all by contract. Whenever the legislature has authorized any person or corporation to condemn the lands of others in order to carry on its business, the courts will regard this as a legislative declaration that this character of business is such as that the public has so great and direct an interest in it that the courts must hold it as contrary to public policy to permit any restriction of it by private contract. Citing *W. U. Tel. Co. vs. Am. U. Tel. Co.*, 65 Ga., 160 (38 Am. R., 781); *W. U. Tel. Co. vs. Ry. Co.*, 86 Ill., 246 (29 Am. R., 31). See, also, *Oregon Steam Nav. Co. vs. Winsor*, 20 Wall., 64.

Sec. 334. The Same.

Municipal grants of exclusive use are void because the general rule of law denies to municipal corporations the power to create monopolies. *Citizens' G. & M. Co. vs. Elwood*, 114 Ind., 332 (1887); *Gas Co. vs. Parkersburg*, 30 W. Va., 435 (1887).

The right of the legislature to confer upon private corporations the exclusive right to furnish gas to the citizens of a municipality was at first denied as creating a monopoly. *Norwich G. L. Co. vs. N. C. G. Co.*, 25 Conn., 19 (1856).

But all doubt has been since removed by subjecting such contracts to the police power of the State,

while upholding their sanctity when otherwise valid. *N. O. W. W. Co. vs. Rivers*, 115 U. S., 674 (1885); *N. O. G. L. Co. vs. La., Etc., Co. Id.*, 650 (1885); *Louisville Gas Co. vs. Citizens' G. L. Co., Id.*, 683 (1885); *W. N. Co. vs. N. O. W. W. Co.*, 120 U. S., 64 (1886); *Binghamton Bridge*, 70 U. S., 51 (1865).

Sec. 335. Maximum Price Named in Statute Cannot be Exceeded.

A gas company which uses the streets of a town for laying its pipes under general permission therefor, contained in an ordinance under Sec. 4306, Rev. Stat. Indiana, 1894, limiting price to consumers to a certain maximum, will be enjoined from charging a consumer more than such maximum. *Gas & Milling Co. vs. Mendenhall*, 142 Ind., 538 (1895).

This is an important case and must apply with slight changes, if any, to other states having similar statutes upon the subject. By the act in question, incorporated towns and cities are empowered to enact a general ordinance to reasonably regulate the supply, distribution and consumption of natural gas, and to require a fee for the use of the streets granted.

Per JORDAN, J.:

"It was held in effect by this court, in the appeal of *Gas & Mining Co. vs. Elwood*, 114 Ind., 332, that such a general ordinance must allow all companies, corporations or persons to use the streets, as near as practicable, on equal terms and conditions; that the statute of 1887 at least impliedly forbids the grant of special privileges by special contract or license to any one company, corporation or person to the exclusion of others. * * *

"The town had the right, in granting the use of its streets, to impose such reasonable requirements, terms, regulations and con-

ditions therein upon those accepting the privileges and benefits of the grant, as its own prudence and discretion might dictate, so as not to restrict, however, the town in its legitimate exercise of legislative powers. The authority to present such terms and conditions, if not expressly conferred by the act of 1887, may at least be reasonably inferred therefrom, in order that the full force and effect may be given to the power expressly granted. *Crawfordsville vs. Brader*, 130 Ind., 149 (14 L. R. A., 268); *Indianapolis vs. Gas Trust Co.*, 140 Ind., 107 (27 L. R. A., 514).

"There was no compulsion upon the appellant to accept the rights upon the terms and conditions imposed under the ordinance; it did so, however, voluntarily and unreservedly. By executing the bond in question, and the written acceptance of the franchise, there was a clear manifestation of consent upon appellant's part, to accept the rights granted upon the terms and conditions proposed by the ordinance, and to be bound thereby. Having accepted the franchise granted by the ordinance, and having agreed to be bound by the express terms as to the price of gas, and having engaged in the exercise of the privileges under the grant, and so continuing to do, it is now precluded from successfully refusing to discharge its obligations to the inhabitants of the town who desire to use its fuel, upon the ground that they refuse to pay a price therefor in excess of the maximum rate fixed by the ordinance."

To the same effect as to maximum rates is *Rushville vs. Rushville N. G. Co.*, 132 Ind., 575 (1892).

The business of manufacturing and distributing gas for fuel and illuminating purposes, by means of pipe laid in the streets of a town or city, is a business of a public character; it is the exercise of a franchise belonging to the State, which has been granted to an individual or corporation, under legislative authority through the action of such municipalities; the services rendered, and to be rendered, for such a grant are of a public nature, and the grantee owes a duty to the public. *People vs. Chicago Gas Trust Co.*, 130 Ill., 268; S. C., 8 L. R. A., 497, and cases cited.

Sec. 336. A Gas Franchise Accepted becomes a Contract.

The case of *Indianapolis vs. Consumers' Gas Trust Co.*, 140 Ind., 107 (1894), referred to above, is a re-statement as to natural gas of principles which have long been familiar. They are in the main to the effect that a franchise to lay gas mains in a public street becomes, when accepted, a contract beyond the possibility of subsequent impairment. The principal ruling was as follows :

“The grant of a right by a city to a gas company to lay and repair mains in its streets cannot be subsequently taken away from such company on the ground that new and other methods of improving streets had been introduced and adopted by the city after such grant had been made, and, especially is this true, where the original grant bound such company to speedily repair such portions of the street as it opened for the purpose of laying and repairing such mains. Nor can such city, by a subsequent ordinance, require such company to first obtain permission of it to lay a main in or upon a street, or to repair its mains, when it had that right, without first obtaining such permission, under its original grant or franchise.”

Counsel, of course, made the point that such grants are but the exercise of the police power, and may be changed or repealed by the granting power. But the court placed the case upon the same ground as *Indianapolis vs. Indianapolis Gas Light & Coke Co.*, 66 Ind., 396, where it was said :

“These two powers need not be confounded. The exercise of the legislative power requires the consent of no person except those who legislate, while it is impossible to make a contract without the consent of another or others. We think, therefore, that when the City of Indianapolis made the contract in question with the gas light company, it made it in the exercise of its power to contract and not in the exercise of its power to legislate, although the power to make the contract was authorized

by an ordinance; and, having the power to make a contract touching the subject-matter, it had the right to make it according to its own discretion as to its prudence or good policy, within the limits of its franchise. Nor can we see that the contract in the least restricts the legislative powers of the city, except that, as the sanctity of the contract is shielded by the Constitution of the United States, it cannot in the exercise of its legislative power impair its validity; for it would be a solecism to hold that a municipal corporation can impair the validity of a contract, when the State which created the corporation, by its solemn acts, has no such power."

Citing *Ins. Co. vs. Debolt*, 16 How., 415; *Gas Co. vs. Light Co.*, 115 U. S., 650; *Stone vs. Mississippi*, 101 U. S. R., 814.

WAITE, C. J., in the last-named case:

"Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power than to give an abstract definition of the power itself, which will be in all respects accurate. No one, however, denies that it extends to all matters affecting the public health or the public morals."

Sec. 337. The Same.

Where A grants to B a right of way to lay a natural gas-pipe-line, and the writing is signed by the grantor alone, which is accepted by the grantee, and the written instrument is duly received in the proper county, the instrument is a contract entered into by both the parties and cannot be annulled by one of them only. The grantor has no rights under such lease until grantee has occupied said right of way and the grantee cannot be bound to use the right of way in a definite time unless so specified in lease. And where the grantee of the right of way by mistake placed said pipe-line entirely off grantor's land, and

believing that it was in said right of way, permitted grantor to make connection and use the gas, such acts did not estop grantee nor secure any additional rights to grantor. *Harlan vs. Logansport N. G. Co.*, 133 Ind., 323 (1892); following *R. W. Co. vs. Fisher*, 125 Ind., 19.

Sec. 338. The True Ground of Distinction.

It is too well settled to be longer the subject of controversy that, where the owner of property devotes it to a use in which the public have an interest, he must, to the extent of the interest thus acquired by the public, submit to the control of such property by the public for the common good. *Munn vs. Illinois*, 94 U. S., 113; *Zanesville vs. Z. Gas Co.*, 23 N. E. R., 55 (Ohio); *Hockett vs. State*, 105 Ind., 217; *Rushville vs. R. N. G. Co.*, 132 Ind., 575.

This right of control includes the power to fix reasonable maximum rates, *unless the State or the municipality is restrained by some provision in the charter or grant of the license which amounts to a contract.* *Munn vs. Ill.*, *supra*; *Peik vs. Chicago Ry. Co.*, 94 U. S., 164.

CHAPTER XIII.

PARTNERSHIP AND TENANCY IN COMMON.

Sec. 339.

It is elementary law that a partnership can be created (a) by express contract ; (b) by the blending of separate estates into a common title, and (c) by the acts, declarations and admissions of the parties ; two of the most significant of these "acts," however, being contribution to the partnership fund and sharing in the profits as such, and all predicated upon a contract to become partners expressed between the parties or implied by law.*

Recognizing this as elementary, there yet remains a broad field for observation and study as to just where the line is to be drawn between acts which do and those which do not establish this relation between parties. For it will be noted that the courts have been careful in almost all the cases cited to administer a warning, the clear meaning of which is that, if the "conduct" of the parties should be calculated to mislead others by affording any ground for an implied agency, the partnership relation will be at once judicially fixed.

This is not a treatise upon the law of partnership, however, and reference must be had to the standard

* In reading the English cases, the fact that their mining operations are largely carried on by companies, the members of which are shareholders, should not be lost sight of.

works upon that subject for a definition of the conduct and a classification of the acts giving rise to this implication.

Sec. 340. Partnership and Tenancy in Common—Distinction.

We will proceed to examine the decisions upon a point which has given rise to a majority of the controversies in this particular branch of the law, namely, the exact nature of an association of persons engaged in oil and gas operations.

The discussion has been as to whether they are merely tenants in common of the property, or partners in the business of operating.

As a condensed statement of the general law upon the subject, none better can be found than that given by Lindley's Partnership, Sec. VI, p. 51 :

"Co-owners not co-partners. No partnership necessarily subsists among persons to whom property descends, or is given jointly or in common ; and even if several persons agree to buy property, to hold jointly or in common, although by the purchase they become co-owners, they do not become partners unless that also was their intention.

"Co-ownership and co-partnership compared. Speaking generally, and excluding all exceptional cases, the principal difference between co-ownership and partnership may be stated as follows :

"1. Co-ownership is not necessarily the result of agreement. Partnership is.

"2. Co-ownership does not necessarily involve community of profit or of loss. Partnership does.

"3. One co-owner can, without the consent of the others, transfer his interest to a stranger, so as to put him in the same position as regards the other owners as the transferer himself was before the transfer. A partner cannot do this.

"4. One co-owner is not as such the agent real or implied of the others. A partner is.

" 5. One co-owner has no lien on the thing owned in common for outlays or expenses, nor for what may be due from the others as their share of a common debt. A partner has.

" 6. One co-owner of land is entitled to have it divided between himself and co-owners, but not (except by virtue of a recent statute) to have it sold against their consent. A partner has no right to partition in specie, but is entitled, on a dissolution, to have the partnership property, whether land or not, sold, and the proceeds divided.

" 7. As between the real and personal representatives of a deceased co-owner of freehold land, the equitable as well as the legal interest in his share is real estate; whilst as between the real and personal representatives of a deceased partner, the equitable interest in his share of partnership freehold property is treated as personal estate, although the legal interest in it is real estate.

" 8. Co-ownership not necessarily existing for the sake of gain, and partnership existing for no other purpose, the remedies by way of account and otherwise which one co-owner has against the others, are in many important respects different from and less expensive than those which one partner has against his co-partners.

" Co-owners sharing profits.—When, however, co-owners of property employ it with a view to profit, and divide the profit obtained by its employment, the difference, if any, between them and partners becomes very obscure. The point to be determined is, whether, from all the circumstances of the case, an agreement for a partnership ought to be inferred; but this is often an extremely difficult question.

" If each owner does nothing more than take his share of the gross returns obtained by the use of the common property, partnership is not the result. On the other hand, if the owners convert those returns into money, bring that money into a common stock, defray out of it the expenses of obtaining the returns, and then divide the net profits, partnership is created in the profits if not also in the property which yields them."

Sec. 341.

The undoubted trend of the later authorities is in favor of the joint or common tenancy, and not to stamp an association as a partnership unless the contract or

conduct of the parties clearly demands it. When this appears, however, the courts have not hesitated to affirm the existence of the partnership, and it is to the cases illustrative of this difference that attention is now directed.

Sec. 342. Co-adventurers in a Mine Have No Implied Power of Agency, One for the Other.

Said TRUNKEY, J., in delivering the opinion of the court in *Ash vs. Guie*, 97 Pa., 493 (1881):

“Every partner is agent for the partnership, and as concerns himself he is a principal and he may bind others by contract, though it be against an agreement between himself and his partners. A joint tenant has not the same power, by virtue of the relation, to bind his co-tenant. *Thus, one of the several co-adventurers in a mine has not, as such, any authority to pledge the credit of the general body for money borrowed for the purposes of the concern.* And the fact of his having the general management of the mine makes no difference, in the absence of evidence from which an implied authority for that purpose can be inferred. *Ricketts vs. Bennett*, 4 M. G. & S., 686 (56 E. C. L.).”

Sec. 343. Participation in Profits Cogent, But Not Conclusive Evidence—Its Absence Conclusive Against Partnership.

MITCHELL, J., in *Walker vs. Tupper*, 152 Pa., 1 (1892).

“No general definition of partnership has yet been given which applies without qualification to all the infinite variety of business arrangements in this commercial age, but an essential element universally conceded is participation in profits as such. Even this does not necessarily create partnership. In *Heckert vs. Fagely*, 6 W. & S., 139, it was said by HUSTON, J.: ‘The general rule that all who share in profits are liable as partners has long been subject to many exceptions.’ And, in *Edwards vs. Tracy*, 62 Pa., 374, the modern English law was stated by SHARSWOOD, J., to be

that direct participation in profits, as such, is cogent, but not conclusive evidence of a partnership. Participation in profits is, however, the most generally accepted test, and, though it is conceded that its presence is not conclusive in favor, *its absence may be regarded as conclusive against partnership.*" Cf. *Kifer vs. Smyers*, 15 Atl. R., 904.

Sec. 344. Product and Profit.

The distinction between product and profit is adverted to in *Brown vs. Jaquette*, 94 Pa., 113 (1880), as follows :

"There is no division of profits ; no responsibility on the part of Brown for losses, and no joint ownership in anything. The landlord is to receive one-half the product of the farm. This must not be confounded with profits. The product of the farm is one thing ; the profit is another, and very different matter. The product may be large ; the profit inconsiderable."

Sec. 345. The Same—Division of Product in Kind Raises Presumption Against Partnership.

After giving a synopsis of the covenants and stipulations of the lease in *Walker vs. Tupper*, *supra*, Judge MITCHELL continues (and, it may be remarked here, makes the point one of the touch stones, recognized in the subsequent decisions of the court upon the subject, by which the distinction is to be drawn) :

"In all these covenants and stipulations thus briefly summarized, *there is no blending of estates into a common title in all the parties, nor any provision for the division or participation in profits. The title of each owner remains distinct as it was before.* If one should sell, his vendee would acquire an undivided interest in the estate itself, not a mere right to an account and the balance due the vendor. Their estates never merged into the joint ownership of a firm, but remained as they were at first, tenancies in common in the land itself. Nor was there to be any distribution of profits ; 'it is understood and agreed that said first parties are to be the owners or

the full equal one-fourth of all the *production*'; precisely the share to which their estate of one-fourth in common entitled them. The division of the product in specie might not necessarily negative the idea of a partnership, but it would raise a presumption against it to overcome which an actual intent to become partners should clearly appear."

Sec. 346. The Same—Mere Co-tenancy Raises No Presumption of Partnership.

And, in *Taylor vs. Fried*, 161 Pa., 53 (1894), it was *held* that a division of the product between tenants in common does not make them partners, although they may have contributed labor or money to raise it, and no presumption of partnership arises from the mere fact of co-tenancy, the court approving the proposition of Mr. Lindley (*Partnership*, p. 53) that

"Persons who join in the purchase of goods, not for the purpose of selling them again, but for the purpose of dividing the goods themselves, are not partners, and are not liable to third parties, as if they were." Citing *Coope vs. Eyre*, 1 H. Blacks, 37; Cf. *Bronson vs. Lane*, 91 Pa., 153 (1879).

Sec. 347. The Same—The Law Will Not Create the Partnership Relation for Tenants in Common.

The case of *Dunham vs. Loverock*, 158 Pa., 197 (1893), is the next in point of time and to the same general effect, with the important qualification, to which the court is careful to call attention, that the question involved is not raised between tenants in common and third persons, but *inter sese*. It holds briefly that tenants in common may become partners, like other persons, by express agreement, but the law will not create the relation for them as the consequence of a course of conduct and dealing naturally

referable to the relation already existing between them, which makes such a course of conduct to their common advantage.*

Sec. 348. Co-tenants Developing Property Presumed to Maintain the Same Relations.

And, in *Buller Sav. Bank vs. Osborne*, 159 Pa., 10 (1893), the court went a step farther, holding that tenants in common engaged in the improvement or development of the common property will be *presumed*, in the absence of a contract of partnership, to hold the same relation to each other during such improvement or development as before it began. As to third persons, they may subject themselves to liability as partners by a course of dealing or by their acts and declarations, but, as to each other, their relation depends upon their title until changed by agreement.

When tenants in common of an oil lease agree to carry on operations upon their land, each contributing a proportionate share of the expenses, they will be considered *both as to themselves and third persons* as the ordinary owners of the land, working their respective shares of the wells, responsible only for their own acts, subject to no laws of partnership

* In *Grubbs' Appeal*, 66 Pa., 117 (1870), the parties owned ore lands as tenants in common. They entered into partnership in manufacturing iron, and bought other real estate. The proceeds from the land and the purchase-money of the real estate were carried into the firm books with the partnership transactions. *Held*, that these circumstances did not make the land and the proceeds firm property.

The question, however, arose upon the relation of the parties, *inter sese*.

whatever, and possessing distinct rights in the property.

No *presumption* of a partnership arises from the operation of an oil well by tenants in common. *Neill vs. Shamburg*, 158 Pa., 263 (1893).

In distributing proceeds in the hands of a receiver, derived from an oil lease owned by three debtors, they will be deemed tenants in common, and no discrimination between their individual and joint creditors will be made, unless there was a partnership, in fact, or by holding out. *Meridian Nat. Bk. vs. McConica*, 8 Ohio C. C. R., 442.

Sec. 349. One of Several Tenants in Common Mining Coal and Taking the Proceeds Thereof, Liable to Account to his Co-tenants for the Value of the Coal in Place.

A died intestate, leaving a widow and children. Included in his estate were coal lands upon which mines were opened. The grantees of the children went into possession of the lands and mined them without any objection on the part of the widow. After nearly all the coal was mined, the widow filed a bill in equity under the Pennsylvania Act of April 25, 1850, for an accounting. *Held*, that she was not entitled to compel the defendants to account as trespassers, but only as co-tenants, Mr. Justice DEAN saying :

“ There is no hostility in the estates which gives the right of enjoyment to either to the exclusion of the other. The land descending from a common source, the intestate husband and father, the statute declares the *quantum* of the estate (one-third to the widow for her life) and plainly intends it shall be enjoyed according to their respective interests ; and unless there be actual deforcement, the turning out of her who is in lawful possession, all

she is entitled to is an account from the children. Unless there be a severance of the inheritance, she cannot treat her co-tenants as trespassers, merely because they have actually managed the common estate and have received the whole of the rents or proceeds." *M'Gowan vs. Bailey*, 179 Pa., 471 (1897).

Sec. 350. Mineral Rights Under Unseated Lands—Taxation.

Unseated lands are alone liable for taxes assessed thereon ; there is no personal responsibility upon the owner thereof. The owner of mineral rights under such land, holding by virtue of a reservation in a deed, is neither a tenant in common nor a joint tenant with the owner of the surface. Hence a payment of taxes by such owner of mineral rights, in order to prevent a sale of the same, cannot be recovered back from the owners of the surface. *Neill vs. Lacy*, 110 Pa., 294 (1885); Cf. *Powell vs. Lantzy*, 16 C. C. R., 417 (1895); S. C. ('95 S. C.) 4 Dist. R., 558.

Sec. 351. Equitable Remedy for Partnerships Administered to Tenants in Common.

Upon a question as to the form of remedy between joint tenants of an ordinary oil lease, both parties having expended money upon the enterprise, but defendant refusing to furnish plaintiff a statement of expenditures, the Supreme Court said :

"It is a case of parties *whose real relations to each other are those of partners in a joint business*,"

and proceeded to grant the relief incident to disputes between partners as such. *Johnston vs. Price*, 172 Pa., 434 (1896).

Sec. 352. Practice in Pennsylvania—Use of the Action of *Assumpsit*.

Another, and even more important point, is settled by this case, namely, that assumpsit can be maintained by one co-tenant against another *only on an express promise to pay rent or to account*. In the absence of an express promise of a liquidated sum, all a co-tenant is obliged to account for is a share of the profits.

Sec. 353. The Same—Action of Account Render.

Where an action of account render will lie in Pennsylvania between tenants in common, a court of equity has concurrent jurisdiction under the act of 4 Anne, Ch., 15, in force in that commonwealth; the provisions of the act of October 14, 1840, and the act of June 15, 1840. *Harrington vs. Oil Co.*, 178 Pa., 444 (1896).

See Title "*Remedies*."

Sec. 354. Owners of a Leasehold by Admissions, Acts and Declarations may Convert it into a Partnership.

And now a vital distinction presents itself; for we must note that, although a leasehold be held by owners in undivided shares under instruments made to them in their individual names, yet the property being a mere chattel, *they, by associating as partners in its operation and development, may convert it into partnership assets*; and such associations may be established by evidence of the several admissions of the alleged partners, or of the admissions of one, and the

acts and declarations of the others. *Brown vs. Beecher*, 120 Pa., 590 (1888).

CLARK, J.:

"There is abundant evidence upon which the facts found by the court might have been submitted to the jury; not only so, it was clear, consistent and wholly uncontradicted. It was not required of the defendants to show, by direct and positive proof, the exact time, or by what means, the leaseholds were taken into the partnership, or to introduce the precise act or ceremony by which it was done; it was sufficient if, from all the evidence, the fact was fairly inferable. The fact that there is a partnership may be established by the several admissions of those who are alleged to compose it, or by the admissions of one and declarations of the others. *Reed vs. Kremer*, 111 Pa., 482. There was certainly evidence of a partnership, and of these leases having gone into the partnership stock, which it would have been manifest error for the court to withdraw from the jury. The writings were in their individual names, but the property was a mere chattel; and if the parties by parol associated themselves as partners, for the purpose of developing and operating it for the production of oil, it might thereby be converted into partnership assets, for the payment of partnership debts. *Patterson vs. Silliman*, 28 Pa., 304."

An assignment by one party of his share therein, without the knowledge and assent of the others, is subject to the equity of the latter to have the partnership debts then existing first paid out of the partnership assets. *Ibid*; citing *Chamberlain vs. Dow*, 16 W. N. C., 532.

Sec. 355. Duty to Disclose.

The legal status of the parties in an oil or gas enterprise having been ascertained, it becomes of interest to inquire into their rights and duties one to the other. And, among the first of the latter, is the duty to disclose.

No clearer statement of the law of partnership touching the relations of the members *inter sese*, and the duty of those forming an association to disclose to those whom they invite to join with them the facts forming the basis of the enterprise has been made than that contained in *Densmore Oil Co. vs. Densmore*, 64 Pa., 43 (1870).

The facts were, briefly, that Densmore and two others were the owners of certain oil lands, leases and rights in Venango County, Pa., and had spent over \$100,000, in improving and developing them. In March, 1864, they came to Philadelphia to ascertain whether or not the property could be sold to advantage. The result was the organization of a stock company with 50,000 shares at \$10 each, \$5 to be paid in cash, the price of the Venango property being fixed at \$250,000, Densmore and his associate owners agreeing to take \$122,500 in money, and the balance in stock. Upon a bill filed by the other stockholders alleging that defendants, Densmore and his fellows, had no right to make a profit at their expense, but were bound to disclose to them all the circumstances, the Supreme Court, by SHARSWOOD, J., said :

“There are two principles applicable to all partnerships or associations for a common purpose of trade or business, which appear to be well settled on reason and authority.

“The first is, that any man or number of men, who are the owners of any kind of property, real or personal, may form a partnership or association with others, and sell that property to the association at any price which may be agreed upon between them, no matter what it may have originally cost, provided there be no fraudulent misrepresentation made by the vendors to their associates. They are not bound to disclose the profit which they may realize by the transaction. They were, in no sense, agents or trustees in the original purchase, and it follows, that there is no confi-

dential relation between the parties, which affects them with any trust. It is like any other case of vendor and vendee. They deal at arms' length. Their partners are in no better position than strangers. They must exercise their own judgment as to the value of what they buy. As it is succinctly and well stated in *Foss vs. Harbottle*, 2 Hare, 489, 'A party may have a clear right to say, I begin the transaction at this time. I have purchased land, no matter how or from whom, or at what price. I am willing to sell it at a certain price for a given purpose.' This principle was recognized and applied by this court in the recent case of *McElhenny's Administrators vs. The Hubert Oil Co.*, decided May 11, 1869 (11 P. F. Smith, 188). 'It nowhere appears', said the present Chief Justice, 'that McElhenny, the purchaser from Hubert, the original owner, did it as the agent of Messrs. Baird, Boyd & Co. and others, though he bought it to sell again, no doubt; he had a perfect right, therefore, to deal with them at arms' length, as it seems he did.' And, again: 'If the property was not purchased by McElhenny for the use, and as agent for the company, but for his own use, he might sell it at a profit, most assuredly. No subsequent purchasers from his vendees would have any right to call upon him to account for the profits made on his sale.' In that case, McElhenny, being the owner of property which had cost him only \$4000, sold it to Baird, Boyd & Co. and others, who associated with him to form an oil company for \$12,000, and it was decided that the company could not call him in equity to account for the profit he had made.

"The second principle is, that where persons form such an association, or begin or start the project of one, from that time they do stand in a confidential relation to each other, and to all others who may subsequently become members or subscribers, and it is not competent for any of them to purchase property for the purposes of such a company, and then sell it at an advance, without a full disclosure of the facts. They must account to the company for the profit, because it legitimately is theirs. It is a familiar principle of the law of partnership—one partner cannot buy and sell to the partnership at a profit; nor if a partnership is in contemplation merely, can he purchase with a view to a future sale, without accounting for the profit. Within the scope of the partnership business, each associate is the general agent of the others,

and he cannot divest himself of that character without their knowledge and consent. This is the principle of *Hichens vs. Congrove*, 4 Russ., 562; *Fawcett vs. Whitehouse*, 1 Russ. & M., 132, and the other cases which have been relied on by the appellants. It was recognized in *McElhenny's Admin'rs vs. The Hubert Oil Co.*, just cited, and also in *Simons vs. The Vulcan Oil Co.*, decided by this court, May 11, 1869 (11 P. F. Smith, 202). Both of these cases were complicated with evidence of actual misrepresentations as to the original cost of the property to the vendors. In the opinion of the court in the last case, delivered by THOMPSON, C. J., it is said: 'If the defendants, in fact, acted as the agents of the company in acquiring the property, they could not charge a profit as against their principal. Nor was their position any better if they assumed so to act without precedent authority, if their doings were accepted as the acts of agents by the association or company. If, in order to get up a company, they represented themselves as having acted for the association to be formed, and proposed to sell at the same prices they paid, and their purchases were taken on these representations, and stockholders invested in a reliance upon them, it would be a fraud on the company, and all those interested, to allow them to retain the large profits paid them by the company, in ignorance of the true sums actually advanced.' The defendants in that case were subscribers, with others, to the stock of a projected oil company, and, after the plan had been formed, secured to themselves by contract the refusal of the property, which they afterwards sold to the company at a greatly advanced price."

Sec. 356. The Same.

McElhenny's Appeal, 64 Pa., 188 (1869), referred to in the foregoing opinion, was a case growing out of the sale of oil lands by one party to others with whom he was associated, and presenting facts for the operation of both of the principles therein declared. The court declared that there was no evidence of agency or of a trust, or a fiduciary relation, between McElhenny and his vendees (the promoters of the

company), and that he was not liable to them for any portion of the profits made by him in his sale to them; but, inasmuch as, after selling to the promoters, he then joined them in selling to the company, he was *held* to have assumed their position and liabilities, and, if they could not make a profit, he could not.

"That they could not," said THOMPSON, *C. J.*, "results from the fact that they professed to buy for the company in purchasing from McElhenny. Good faith requires that they be held to that position, and he with them. His estate should, therefore, be required to contribute from its assets, if they be sufficient, a sum equal to the profits received by him from the company *in the sale by the promoters to it.*"

Sec. 357. The Same.

Simons vs. Vulcan Oil & M. Co., 61 Pa., 202 (1869), was mainly illustrative of the second principle set forth in *Densmore Oil Co. vs. Densmore*, *supra*. It was a case in which parties acted in acquiring oil territory, and, shortly afterwards, in order to get up a company, represented themselves as having acted for one to be formed, and that the lands acquired were obtained at first cost from the vendors. It was *held* to be a fraud upon those interested to allow them to retain the profits paid them by the company in ignorance of the sums advanced. Further, that the words "original owners" in the prospectus were not terms of art, science or trade which required the aid of experts to explain.

"Nobody could well mistake their meaning. They simply imported that no profits were added to the prices paid by the company for their lands, on account of any intermediate party, buyer or agent between it and the precedent owners of the soil."

But the court drew another distinction in saying :

" We do not doubt that, if the defendants had disclosed the exact sum at which they bought the lands, and had refused to sell for less than the sum which they eventually received, their right to hold the sums received would have been unimpeachable." Followed in *Short vs. Stevenson*, 63 Pa., 95 (1869).*

Sec. 358. But Buyer and Seller Deal at Arm's Length.

The case of *Neill vs. Shamburg*, 158 Pa., 263 (1893), though between vendor and vendee and not between partners, is in point. It was *held* that a person about to purchase an oil lease is not bound to disclose to his vendor facts in regard to the production of oil upon a neighboring leasehold which he owns, and the failure to disclose such facts is not fraud. Unless exceptional circumstances create a duty to speak, it is the right of every man to keep his business to himself.

*" There was, undoubtedly, great laxity of morals, in dealing about real estate in oil sections during the excitement consequent on its discovery. Many transactions like that under consideration have taken place, without being subject to judicial investigation, and parties have pocketed rich returns ; while others have suffered disastrous diminution of their means ; but the impunity with which many have speculated by unjustifiable means, and escaped a call to account to those wronged does not impair the efficiency of the law to redress such a wrong whenever it is judicially made to appear. Hundreds have done as was done in the case before us ; it had become a common thing, and men of fair standing did not hesitate to represent property as having cost sums much beyond those paid by them, as inducements to enlist purchasers. This was wrong in law as well as morals, where there was a relation of trust and confidence, in fact, or assumed, and, in such cases, it is the morality of the law to hold the party so representing to the position he may have occupied, or assumed to have occupied." *Simons vs. Vulcan Oil Co.*, *supra*, p. 222.

Sec. 359. Tenants in Common not Held to the Confidential Relations of Partners.

And, in the same case, a tenant in common had mortgaged his interest to his co-tenant to indemnify him against a contingent loss. After the mortgage was executed, the mortgagor sold and conveyed the mortgaged premises to the mortgagee. *Held*, that there was no such confidential relation between the parties as required the mortgagee to disclose to the mortgagor the facts concerning the production of oil on a neighboring leasehold, owned by the mortgagee.

Sec. 360. The Same—Mining Partnerships.

A notable case in this connection, although it concerns silver and not oil, is that of *Bissell vs. Foss*, 114 U. S. R., 252 (1885). It will repay careful examination, but we can notice here only its salient features, which are :

“ 1. There is no relation of trust or confidence between mining partners, which is violated by the sale and assignment by one partner of his share in the company assets and business to one or more of his associates, without the knowledge of the other associates.

“ 2. It is true that one of two or more *tenants in common*, holding by a common title, cannot purchase an outstanding title or incumbrance upon the joint estate for his own benefit. Such a purchase enures to the benefit of all, because there is an obligation between them, resulting from their joint claim and community of interest, that one of them shall not affect the claim to the prejudice of the others. *Rothwell vs. Dewees*, 2 Black, 613; *Van Horne vs. Fonda*, 5 Johns., Ch. 388; *Lloyd vs. Lynch*, 28 Pa., 419; *Downer vs. Smith*, 38 Vt., 464. But,

“ 3. The record in the case discloses no equitable reason why the defendants in error, who purchased the interest of third parties

in a mine in which all were jointly interested with the plaintiff in error, should be held bound to share with him the interest so purchased.

“ 4. There is a legal obligation capable of enforcement *in foro externo*, and there is a natural obligation to be disposed of only *in foro conscientiae*. Story's Eq. Jur., Sec. 2. This was one of those obligations which was binding on the honor and conscience of the party, but one not the subject of a suit, and not to be enforced in a court of either law or equity. ”

Mr. Justice WOODS, delivering the opinion of the court, quotes, with approval, the language of Mr. Justice FIELD in *Kahn vs. Smelting Co.*, 102 U. S. R., 641 (1880):

“ Mining partnerships, as distinct associations, with different rights and liabilities attaching to their members from those attaching to members of ordinary trading partnerships, exist in all mining communities; indeed, without them, successful mining would be attended with difficulties and embarrassments much greater than at present. ”

Skillman vs. Locke, 23 Cal., 199, is then quoted at length to the effect that the *delectus personarum*, which is essential to constitute an ordinary partnership, has no place in these mining associations.

The opinion then proceeds:

“ This case settles two propositions: First, that the members of a mining association have no right to object to the admission of a stranger into the association who buys the share of one of the associates; and, second, that the sale and assignment by one of the associates of his interest does not dissolve the mining partnership. It follows from these propositions that one member of a mining partnership has the right, without consulting his associates, to sell his interest in the partnership to a stranger, and that such a sale injures no right or property of the other associates. Much less does the purchase by one associate of the share of another inflict any wrong upon the other members of the partnership. ”

Sec. 361. General Rule Recognized in West Virginia.

In *Gilchrist vs. Beswick*, 33 W. Va. (1889), the general rule was recognized that one co-tenant or joint owner of land cannot, any more than a partner, clandestinely, or without fair notice to his co-tenants, stipulate with third persons for any private or selfish advantage to himself in respect to the joint property. This, however, was not the case of a mining lease, but of land mortgaged by the joint owners, and an attempt by one of them to buy it for his own benefit for the balance due on the mortgage debt, which was less than one-tenth of the value of the lands. *Held*, that a court of equity will hold that the purchase was for the benefit of all the owners.

Further inquiry into the relations, *inter sese*, of parties associated in an oil or gas enterprise, develops the following points.

Sec. 362. Inability of One Tenant in Common to Surrender Lease.

One tenant in common cannot, without the consent of his co-tenants, bind their interests by a surrender. *Edmunds vs. Mounsey*, 15 Ind. App., 399 (1896); *Williams vs. Vanderbilt*, 145 Ill., 238.

And the same principle of law is recognized by Mr. Justice DEAN, in *Hooks vs. Forst*, 165 Pa., 247 (1895):

"As to the argument that the declarations and acts of C. & L. could not affect the right of S, the other lessee, who was not present, it would be well made if they had been tenants in common of the land; one tenant in common cannot divest the estate of his co-tenant by declarations or deed."

The circumstances of this case were peculiar, and the judgment of the court a righteous rebuke to the astuteness which at times overreaches itself. The lessees had induced lessor to sign a lease which gave him nothing in the line of rescission and themselves everything. The court ruled that the evidence in the case was sufficient to establish a parol rescission.

Sec. 363. Co-tenants Should Bear in Proportion Losses to Joint Property.

Plaintiffs and defendant were tenants in common of an oil lease, plaintiffs owning one-sixth and defendant five-sixths. Plaintiffs drilled a well under contract with defendant, and, by reason of defendant's delay in furnishing casing, the well was destroyed by the falling in of the sides. *Held*, that the plaintiffs and defendant should bear the loss of the well in proportion to their respective interests. *Harrington vs. Oil Co.*, 178 Pa., 444 (1896).

Sec. 364. Payment of Rental to Co-tenants Jointly—Assignment of One.

Where there is a joint lease by two tenants in common for an entire rental, and neither has given notice to the lessee to pay his share of the rent to himself, an assignment by one to a stranger of all his interest in the rental does not cause an apportionment of the rent, or affect in the slightest degree the rights or remedies of the other. *Swint vs. M' Calmont Oil Co.*, 184 Pa., 202 (1898).

Sec. 365. Liability of Incoming Partners.

In *Babcock vs. Stewart*, 58 Pa., 179 (1868), it was *held* that an incoming partner is not liable on the contracts of the firm made before he became a member.

That was a case of an oil producing partnership, certain members of which were sued by Stewart for services rendered, upon a contract made with Babcock as managing partner, before they obtained their interests. Said SHARSWOOD, J., delivering the opinion of the court :

“Nothing is better settled than that an incoming partner is not liable on the contracts and engagements of the firm entered into before he became a member of it. Collyer on Partnership, Sec. 520. The plaintiff in error was, therefore, entitled to have his second point affirmed. The court below did affirm it, but accompanied the affirmance with an explanation, which entirely destroyed its effect. They said: ‘Babcock could not bind one who was not a joint owner when the plaintiff began work or afterwards, but he could bind those who came in while the work was being performed, or who had only parted with a portion of his interest before it began or during its progress.’ From what follows we may conclude that the court considered that owing to the manner in which oil interests were sold, divided and subdivided while work was going on, a different rule was applicable to partnerships in that region. In this there was error. As was said by Lord Kenyon in *Shirreff vs. Wilks*, 1 East, 48: ‘It is hard enough for one partner in any case to be able to bind another without his knowledge or consent; but it would be carrying the liability of partners for each other’s acts, to a most unjust extent, if we suffered a new partner to be bound in this manner for an old debt incurred by other persons.’ When a man purchases an interest in a firm he can inform himself as to what are its assets and the then condition of its works. He is not bound to inquire whether all its property in possession has been paid for. Those who have sold or delivered goods, or done work on the credit of the original partners, having by law no lien, have parted with all their interest in the effects, and can look only personally to those with whom

they have contracted. The credit of the new member of the firm did not enter into their consideration in making the contract, and it would be manifestly unjust to hold him liable to them. The ground of liability of one partner for the acts of the others, is that of an implied general agency within the scope of the partnership. The law of partnership is but a branch of the law of principal and agent. As was said by Lord Cranworth, in *Cox vs. Hickman*, 8 H. L. Cas., 268: 'The real ground of liability (as a partner) is that the trade has been carried on by persons acting on his behalf (that is, of the person sought to be made liable), so that he would stand in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made': *Bullen vs. Sharp*, 1 Law Rep., C. P., 86; *Feigley vs. Sponeberger*, 5 W. & S., 564. If, therefore, any one of the defendants was not a member of the firm when the contract was made, it is evident this ground of liability does not exist. There can be no pretence or implication that the contracting party was then his agent."

Sec. 366. Rights of Tenant in Common Not Joining in Assignment.

Several co-tenants of an oil lease assigned the lease to an operator who was to deliver to them part of the product. One of the joint owners did not join in the assignment, and notified the assignee not to deliver any oil to his co-tenants. *Held*, (1) that the party not joining in the assignment was not entitled to his share of the oil without proving that his co-tenants had received more than their share; (2) that, if he chose to affirm it, he must take his share with the others upon a distribution of the royalty, after deducting all proper charges and expenses; (3) that, if he did not affirm the lease, he had no claim to any share of the *royalty*, and could only look to the lessee as a co-tenant who had not acquired his title. *Enterprise Oil, etc., Co. vs. Transit Co.*, 172 Pa., 421 (1896).

Sec. 367. The Value of the Oil in the Tank the Measure of Damages of Tenant in Common Fraudulently Deprived of His Share.

A tenant in common who has been tortiously deprived by the fraud of his co-tenant of his interest in an oil leasehold is entitled, in a suit brought for his share of the oil produced and converted by the co-tenant while in possession, to recover as damages the value of the oil in the tank, without deduction for the expenses of production. *Foster vs. Weaver*, 118 Pa., 42 (1888).

The circumstances of this case are interesting, and unfortunately, not of uncommon occurrence. The plaintiff and defendants became tenants in common of an oil lease. The plaintiff lived in New York. The defendants were oil operators and had charge of the drilling. Oil was found in paying quantities, but the defendants ordered the suspension of operations, and the well was reported a failure. Soon after, the defendants sent an agent to New York to purchase plaintiff's one-third interest. In this, by false representations as to the value of the well, he succeeded, securing the sale to himself for \$500, which interest he conveyed in a few days to the defendants for \$600. The lease was then further developed and good results obtained. The plaintiff, learning of this, tendered to defendants the \$500 paid him by the agent, and demanded a reconveyance of his third interest and his share of all the oil produced, which was refused. The defendants offered to reconvey to plaintiff and pay his share of the oil, *if he would pay his share of all the expenses of operating*, and also one-third of the balance due on a leasehold mortgage they had given on this and other leases, the plaintiff's share of which

would amount to \$200. This the plaintiff refused to do, and had the defendants and their agent arrested for conspiracy, whereupon a settlement was arrived at, the principal features of which were a reconveyance to him of his one-third; the payment by plaintiff to defendants of what they had paid the agent; the reference to a court of law of the right of defendants to deduct one-third of the expenses and costs of production from the proceeds of plaintiff's one-third of the oil.

The conclusion reached was as above stated, Mr. Justice STERRETT, saying :

"Is the wrongdoer entitled in such a suit to recoup from the value of a mineral as a chattel, the expense of mining or producing it? The mere statement of the proposition in this form suggests the only answer that can be given, unless it is the policy of the law to make the way of the transgressor easy and secure. The relation of the parties to each other, as co-tenants of the lease, and the fact that two of them, after fraudulently dispossessing the other, may have continued to use the property as it would probably have been used if they had all remained in possession, does not mitigate the tort nor qualify the ordinary rule of damages. Co-tenants are bound to respect the rights of each other quite as much as if they were strangers in title."

Sec. 368. Leasehold Interest when Partnership Assets.

An assignee of the undivided interest of a *partner* in a lease takes subject to partnership debts. *Chamberlin vs. Dow*, Sup. Ct. Pa., 16 W. N. C., 532 (1884).

The case, though an important one and frequently cited, is not given in the official reports. It is to be regretted that the court contented itself with a mere affirmance of the judgment of the lower court, the opinion of the learned judge of which, sustaining exceptions to a previous ruling of his own, while

concise, is not conclusive. The Supreme Court states that the case is ruled by *Titusville Novelty Iron Works Appeal*, 77 Pa., 103 (1875), which went off upon the validity of a levy upon a leasehold estate, *held* to be good because the leasehold was a chattel real, the court saying that if it had been of personal chattels, it would have been invalid. While the particular points in each of the cases mentioned are doubtless the law, yet the latter is far from "ruling" the former, and a fuller statement by the court of its reasons would have been of value to the profession.

Sec. 369. Liability in Pennsylvania of Joint Owners for Labor Done or Materials Furnished Oil or Gas Wells—Act May 6, 1891, P. L., p. 41.

This act received careful consideration and construction in the case *Murtland vs. Callihan*, 2 Pa. Super. Ct. R., 340 (1896). The action was *assumpsit* by one co-tenant against one of his fellows to recover one-eighth of the cost of operating an oil lease. The act is as follows :

"SECTION 1. *Be it enacted, etc.*, That from and after the passage of this act, any person or persons performing labor of any kind whatever, or furnishing materials for, upon or about any drilling, pumping or producing oil or gas well, shall have the right to bring suit in *assumpsit* against any joint owner, joint tenant or tenant in common holding an interest in and operating such drilling, pumping or producing oil or gas well, to recover from such joint owner, joint tenant or tenant in common the *pro rata* share due and owing by such joint owner, joint tenant or tenant in common for any labor done, or materials furnished in, upon or about such drilling, pumping or producing oil or gas well, and the interest of such joint owner, joint tenant or tenant in common shall be subject to levy and sale upon any execution issued to enforce

collection of any claim under this act, after judgment obtained by due process of law.

"SECTION 2. Any joint owner, joint tenant or tenant in common paying the *pro rata* share of the necessary expenses of any drilling, producing or pumping oil or gas well for any other joint owner, joint tenant or tenant in common holding an interest in and operating such drilling, pumping or producing oil or gas well, shall have or [and] possess all the rights of action, as provided in the first section of this act, to the same extent as is given hereby to the person or persons performing the said labor or furnishing such materials ;

" *Provided*, That no joint owner, joint tenant or tenant in common shall be required by this act to pay any share of the expenses of operations commenced and carried on without his authority or consent."

The court, after citing *Thompson vs. Newton*, 7 At. Rep., 64, to the effect that a co-tenant who pumps an oil well cannot recover wages or compensation from another who has not employed him, says :

"The word 'operations' in the *proviso* is not to receive the limited meaning claimed for it by the plaintiff. It may mean an utter cessation of all work by everybody, or it may, as in the present case, refer to the work or operating of some particular person. The defendant had an undoubted right to withdraw his consent to the plaintiff's 'operations' in his behalf, and to offer to do his share of the work in person or by proxy. When he did this, the plaintiff had no further right to hold him to a personal liability, and pursue him with a common law action. To recover under the statute, a contract, either express or implied, must be shown as the basis of the claim. The legislature never intended to create contracts between parties whose minds are not at least impliedly agreed, or to force one man, against his express dissent, to buy from or hire another, even although he may in some way be benefited by the latter's services or goods."

And it was accordingly *held* that a joint tenant in such an oil well is not entitled to recover against his fellows for their share of the expense of pumping done by him against their consent.

Sec. 370. Set-offs as Between Lessor and Lessee—Third Parties.

A lessee from a lessor whose premises were subject to forfeiture for non-payment of royalty and other debts, much being in arrear, covenanted to pay the royalty in arrear and accruing rent. Lessor then assigned all his interest in the lease. Upon suit brought by assignee upon the covenant, *held* that lessee could not set-off debts due him by lessor, some of which were due before the assignment. *Ardesco Oil Co. vs. N. Am. Oil & M. Co.*, 66 Pa., 375 (1870).

Sec. 371. Limited Partnerships—Sale of the Business.

A preliminary injunction will be granted to restrain the managers of a limited partnership association, organized under the Pennsylvania Act of June 2, 1874, P. L. 271, from selling the entire business and property of the association without the consent of all the shareholders, at the suit of one having a mere equity in the capital. *Carter vs. Producers' & Refiners' Oil Co.*, 164 Pa., 463 (1894).

No opinion was delivered by the Supreme Court, in accordance with its rule in appeals from orders, awarding or denying a preliminary injunction, nor did the court below place upon the record the reasons for its ruling other than the citation of numerous authorities to the effect that directors are limited to the management of the business, that their powers do not extend to its sale. It is, however, safe to infer from an examination of the record that this was the controlling consideration influencing both courts.

Sec. 372. One who is Already a Member of a Limited Partnership Association and who Purchases Additional Shares is not Entitled to Represent such Additional Interest in the Meetings of the Association unless Elected to Membership Upon Them Also.

Such was the ruling made in *Carter vs. Producers' Oil Co.*, 182 Pa., 551 (1897). The case was one of first impression in Pennsylvania, and arose upon the following state of facts :

The defendant was an association organized under the Act of June 2, 1874, P. L., 271, as amended by the Act of June 25, 1885, P. L., 182, generally known as the Limited Partnership Acts, with a capital stock of \$600,000, divided into 60,000 shares of the par value of ten dollars each. The plaintiff became on June 5, 1893, a member of the association, having purchased 300 shares of the capital stock. In 1894, he *received* from the National Transit Company certificates representing 13,013 shares of the capital stock with blank transfers on the back of each certificate signed by the original holders thereof. Though he had never *purchased* the certificates, he procured from the secretary of the company a *transfer* of these shares, and was registered upon the books of the company as the owner, but was never re-elected to membership *as to the additional shares*.

At meetings of the company in April and June, 1894, plaintiff appeared and claimed to be the owner of the stock so transferred to him, but, upon a resolution to that effect, his vote as to said 13,013 shares was not counted. In January, 1896, he "purchased" other shares to an amount sufficient to make his total holding 30,195 shares—a majority of the capital stock.

At a meeting of the members of the company on June 5, 1894, certain amendments of the rules and regulations were adopted by a vote of a majority in number and value of interest of the members, one forbidding the sale or transfer of any interest in the capital stock to any person not a member of the Producers' Protective Association, unless with the approval in writing of a majority of the board of managers, and another in the terms following :

“ Any person, being a member of the association, who becomes the transferee of additional shares, shall have no right to participate in the subsequent business or profits of the association, or to vote upon such additional shares, unless elected to membership thereupon, following such transfer, in the manner provided above,” *i. e.*, by a vote of the majority of the members in number and value of their interests.

The plaintiff, at the time of his purchase of the shares in controversy, was a shareholder in the Standard Oil Trust, a competitor of the defendant company in the business of producing, refining, transporting and selling petroleum and its products. At the time of his purchase of the stock, he gave to the representatives of the Standard Oil Trust assurances that if he gained control of the defendant company, he would give to the Standard the same facilities for the purpose of oil produced and transported, which were accorded to the so-called “ independent ” refiners and others. He also avowed his intention, if placed in control, to make a radical change in the policy of the company, suppressing entirely all competition which would be objectionable to the Standard.

In January, 1897, he filed his bill to compel the defendant company to concede to him the rights of a member, as to shares of which he was merely a trans-

ferree. Defendant answered, denying such rights, and the issue of law was raised as to the validity of the rule of June 5, 1894, *supra*. The language of the act of June 25, 1885, under which the rule was drawn, is as follows:

"Interest in such partnership association shall be personal estate, and may be transferred, given, bequeathed, distributed, sold or assigned, under such rules and regulations as such partnership associations shall, from time to time, prescribe by a vote of the majority of the members in number and value of their interests; and in the absence of such rules and regulations, the transferee of any interest in such association shall not be entitled to any participation in the subsequent business of such association, unless elected to membership therein by a vote of a majority of the members in number and value of their interest. And any change of ownership, whether by sale, death, bankruptcy or otherwise, which occurs in the absence of any rules and regulations, * * * and which is not followed by election to membership in such association, shall entitle the owner or transferee only to the value of the interest so acquired at the date of acquiring such interest, at a price and upon terms to be mutually agreed upon, and, in default of such agreement," by an appraiser to be appointed by the court of common pleas for the proper county.

Said the Supreme Court, speaking through Mr. Justice M'COLLUM, affirming the action of the court below dismissing the bill:

"It will be observed that the statute makes no distinction between a transferee, who is a member of the partnership association, and a transferee who is not a member of it. The language of the statute fairly excludes such a distinction, and there is nothing in the articles of association which warrants it. It is a distinction which, if made, would enable a member of the association to obtain a controlling interest in it by the purchase of a sufficient number of its shares to defeat the controlling purpose of its organization and to impair, if not absolutely destroy, the interests of the other members. If the legislature had intended to make this distinction, it could, and presumably would, have done so in a few words. The

absence of anything in the statute, indicative of a purpose to make it, tends to confirm the view that *members who purchase shares sustain the same relation to them as purchasers who are not members.* Of what avail is it to deny to a stranger, who buys shares of the capital of the association, the right to vote them without its consent manifested by his election to membership therein, while a member of the association who desires to obtain control of it to defeat the purpose for which it was organized and to change its policy in the interest of a rival company is allowed to vote, without its consent, the shares he has purchased? It seems to us that a construction of the statute which admits of such results is opposed to the spirit, as well as the letter of it, and that so much of the rule of June 5, 1894, as puts the member who purchases shares on the same footing with respect to them as the stranger who purchases shares has, is in clear accord with and authorized by it. We cannot assent to the plaintiff's claim that the defendant company is a corporation and restricted, in the adoption of by-laws, rules and regulations for its government, to such as it is within the power of the latter to prescribe. It may be conceded that the defendant company has some of the qualities of a corporation, but it is nevertheless a partnership association, governed by the statutes and articles under which it was organized, and the rules and regulations it may prescribe in execution of the powers with which the statutes have invested it. We concur in, and need not add anything to, what the learned judge of the court below has so well said on this point, and in respect to the agreement or understanding between the parties when the company was organized. In accordance with the views expressed in this opinion, we overrule the specifications of error."

Among the utterances of the court below (NOYES, P. J.), thus approved, are the following :

"Whether the 'partnership association' ought to be classified by the professor of legal science as a species of the genus corporation, or the genus partnership, or whether it should be set apart as a new genus, seems to me unimportant. If a corporation, it is so peculiar in its features that the general law of corporations cannot be applied to it without important modifications; if a partnership, it so differs from the common type that the general law of partnerships is but slightly applicable. Both the law of corporations and

the law of partnerships are to be resorted to in the absence of statutory regulations, the choice being determined by the nature of the feature under consideration. In the present case we derive little assistance from either. The general rule of corporations invoked by the plaintiff has been laid down to meet the conditions existing in corporations in which the ownership of stock carries with it *ipso facto* membership in the corporate body. If there are corporations in which the conditions are different, it is manifest that the rule is inapplicable to the extent of the difference. The *delectus personarum*, as it exists in partnerships, grows out of the contract of the partners to be associated with each other, and with no others. The reason for it is found in the right of each partner to act as the agent for all the others, the liability of each for the partnership obligations and the right of each to contribution from the others. None of these conditions exist in partnership associations. The case of a transfer of interest from one partner to another is not analogous to the case in hand, for the dissolution is caused in such a case, not by the addition to the interest of one of the partners, which adds nothing to his power, but by the dropping out of the assigning partner, whose continuance is necessary to the partnership existence. * * * Looking at the general scheme of the act, it seems apparent that it was intended to enable persons desiring to combine their capital in any business enterprise to do so without incurring, on the one hand the general liability of partners, or on the other the risk of having the business taken out of the control of those in whom it was originally placed, without their consent, which exists in ordinary corporations. If this be true, it is manifest that transfers of interests from one member to another are within the mischief sought to be prevented, for the members vote, by value of interest as well as number, upon most important questions."

And in the following extract the merits of the entire question are squarely met :

"It seems clear to me that the power of the association to regulate the *status* of transferees of interests in capital is not limited by the regulations prescribed by the act. In conferring upon the association authority to legislate for itself, *it is implied that it may make rules which differ from those prescribed in the act.* If the case

of a transfer to one already in the membership be not included in the terms of the act, it is at most *an omitted case which the association itself may provide for*. The rule adopted by the defendant is not against the terms of the act, for at best the act does not cover it at all. Nor is it unreasonable, for it is in line and harmony with the general spirit and intention of the act. Nor does it infringe any right of the members, *for the owners of the shares may still sell them to whom they please*, the only difference being that a sale to a member is put in the same category as a sale to other persons. No person can claim a vested right to *a greater voting power than was given him by the articles of association*. The full value of the interest is guaranteed to the purchaser in any event."

CHAPTER XIV.

MECHANICS' LIENS.

Sec. 373.

The courts have given construction to the Pennsylvania acts of 1836 and 1845 in a series of well-considered cases, beginning with *Harlan vs. Rand*, 27 Pa., 511. They had uniformly held that to entitle a mechanic or material man to a lien upon a building for work done or materials furnished, it was necessary that the work or materials for which a lien is claimed should have been done or furnished on the basis of a contract, express or implied, with the owner and on the credit of the building. Work done for, and materials furnished to, a sub-contractor, and work done by journeymen and laborers, did not authorize the entry of a lien by the individual, or by him who dealt with a sub-contractor. This construction was well settled, and had been for many years prior to the act of 1887. The object of the legislature in passing the act of 1887 was to change the law in such manner as to extend to and confer upon all laborers and mechanics whose claims amounted to ten dollars and upwards, by whomsoever employed, and to all material men, no matter upon whose order the material was furnished, the same right to a separate lien as was enjoyed by those who were under the protection of the acts of 1836 and 1845, as construed by the courts. Per

WILLIAMS, J., in *Titusville Iron Works vs. Keystone Oil Co.*, 122 Pa., 627 (1888).

But this act, as we shall see from an examination of the same case, did not comply with the constitutional requirements.

Sec. 374. The act of June 17, 1887, entitled "An act relating to the liens of mechanics and others upon buildings," unconstitutional.

Two acts upon the subject were approved by the Governor of Pennsylvania on the same day. One bearing the foregoing title and providing that the Mechanics' Lien Acts of 1836 and 1845 *should be construed to embrace* claims for labor done in the erection and construction of buildings by mechanics and laborers "as liens are not allowed for material furnished," *i. e.*, for all labor done, no matter at whose instance or upon whose credit it was done, was held to be in violation of Sec. 6, of Art. III of the Constitution of Pennsylvania, providing that no law shall be revived, amended, *extended* or conferred by reference to its title only; and, also, as being an attempted exercise of the judicial power by a department of the government which does not possess it. *Titusville Iron Works vs. Keystone Oil Co.*, *supra*.

The other act entitled, "An act relating to the liens of mechanics, laborers and others, upon leasehold estates and property thereon," was pronounced unconstitutional by the Court of Common Pleas of Washington County in the case of *M'Keever vs. Victor Oil Co.*, 9 Pa. Co. Ct. R., 284 (1890), upon the ground just mentioned; and, also, because the subject of the act was not clearly expressed in its title.

In the case of *Strawick vs. Munhall*, 139 Pa., 163 (1891), decided six days later by the Supreme Court of the State, the question of the constitutionality of the act was not raised, and the court gave the following construction to one of its provisions.

Sec. 375. Notice of Intention.

The notice of an intention to file a lien required by the last proviso of Section 1 of the act is the basis of the right, and must be given to the owner, or reputed owner, at the time the work is begun.

The word "when" in the first clause of the proviso is equivalent to the words "at the time" in the last proviso of Section 1, act of May 18, 1887, relating to liens for repairs, and the notice being indispensable for the lien and the protection of the owner of the leasehold, a notice of the intention to file the lien given after the work is done, is too late.

Sec. 376.

In *St. Clair Coal Co. vs. Martz*, 75 Pa., 384 (1874), a lien had been filed against a leasehold and machinery under the local act of February 17, 1858, extending the provisions of the act of 1836 to all improvements "erected or put up by tenants of leased estates on lands of others in Luzerne and Schuylkill Counties, etc., provided that the lien, etc., shall extend only to the interest of the tenants or lessee therein and to the improvements, etc., erected." *Held*, that the claim could be filed only against the specific improvement.

Per SHARSWOOD, J.:

"The claim filed is against the entire *leasehold* in the colliery. The Act of Assembly gave the plaintiff no such lien. It confines the lien clearly to the interest of the lessees in the improvement and machinery upon which his labor and services were bestowed."

Sec. 377.

Under the act of 1836, a mechanics' lien may be filed for lumber furnished for or about the construction of buildings constituting the plant of an oil refinery. *Short vs. Miller*, 120 Pa., 470 (1888).

Sec. 378. Local Laws.

Newell vs. Haworth, 66 Pa., 363 (1870), and in *Gibbs vs. Peck*, 77 Pa., 86 (1874), the acts of February 17, 1858, and of April 8, 1868, are considered, and the provisions of the former, applicable to Luzerne and Schuylkill Counties, were *held* to have been repealed by the latter, applicable to Venango, and by a later act extended to Crawford County.

An agreement to occupy land for oil purposes and erect buildings was *held* to constitute an oil lease, and the estate of the lessee was held to be subject to the special mechanics' lien law of April 8, 1868 (P. L. 752), applicable only to Venango County, Pennsylvania. *McElvaine vs. Brown*, 11 Atl., 453.

Sec. 379. Paraffine Works Part of Oil Refinery.

Paraffine works may properly be included in, and construed to be part of, a manufacturing plant known and operated as an oil refinery; and such a lien, filed against the whole plant and the enclosed ground on which the buildings were erected, and which was

necessary for its operations, is in proper form. *Sicardi vs. Keystone Oil Co.*, 149 Pa., 139 (1892).

Prima facie the liens of mechanics cover the whole of the ground described in the claims ; and in case the owner or lien creditors consider that there is too much land included in the claim, their remedy is under the act of June 16, 1836. *Ibid.*

Sec. 380. Requisites.

A mechanics' lien enumerating several structures, consisting of stills, tanks, boilers, agitators, drums, etc., stating their dimensions, material and uses, and averring that they constitute an oil refinery, upon a parcel of ground particularly described, is sufficient.

Such a lien filed against an oil refinery and in sufficient form, is good under the act of June 16, 1836, though the several structures constituting the refinery consist of appliances put up in the open air, and not inclosed or covered by any roof or shed. *Titusville Iron Works vs. Keystone Oil Co.*, 130 Pa., 211 (1889). Citing *Short vs. Ames*, 121 Pa., 530 (1888).

Sec. 381. The Same.

The case of the *Linden Steel Co. vs. Imperial Refining Co.*, 138 Pa., 10 (1890), covers several features of the statute. It was there *held* :

1. If a mechanics' claim for lien filed under the act of June 16, 1836, and its supplements, contains a description of the locality and of the peculiarities of the building, adequate to point out and identify it with reasonable certainty, it is a sufficient compliance with the requirements of the act. *Kennedy vs. House*, 41 Pa., 39.

2. An oil refinery, though peculiar in its construction, is the proper subject of a mechanics' lien under the act of 1836; and, as the ordinary forms or methods of description are inapplicable, it is sufficient if there be such reasonable certainty of description as will clearly identify the subject of the lien claimed, to creditors, purchasers and others.

3. A mechanics' claim having been filed against a refinery, described with great particularity the land on which the refinery was erected, but only in general terms the buildings and structures composing the same, and, for a more particular description thereof, referred to an accompanying map, which showed the sizes and locations of all the buildings and the connections between them, and the names of the principal structures. *Held*, that the claim contained a description sufficient to comply with the statute.

4. A motion by the plaintiff to amend, more than six months after the filing of the lien, during the pendency of a *scire facias* thereon and after a motion by the defendant to strike it off, by filing a paper explaining with particularity what each of the diagrams on the map represented, should have been allowed, the effect of the amendment being to make the claim more precise, specific and particular.

5. A claim for lien for materials furnished on March 17, 22, and 27, 1888, for the erection of an addition of a refinery, stating that notice of an intention to claim a lien was given on, prior to and after March 28, 1888, and that such intention was expressly recognized, known and understood by all parties from the beginning of the negotiation for the materials, sufficiently avers the notice to the owner required by the act of May 18, 1887, P. L., 118.

This provision was as follows .

"To entitle anyone to the benefits of this act, he shall give notice to the owner, or reputed owner, of the property, or his or her agent, at the time of furnishing the materials or performing work, etc., of his intention to file a lien under the provisions of this act."

The act itself extended to all the counties of the State the provisions of the act of May 1, 1861, theretofore applicable only to Chester, Delaware and Berks Counties.

Sec. 382. Particularity of Description—Reasonable Certainty.

In *Ely vs. Wren*, 90 Pa., 148 (1879), claimant's demand was disallowed because lacking in the exactness and accuracy which should appear when a special security and remedy are given to a favored class of creditors.

Said STERRETT, J.:

"There is an absence of that certainty and precision which should characterize a statement that forms the basis of a special lien, which, if not otherwise satisfied, is designed to be enforced by a judicial sale, resulting in a transfer of title. The proceeding is *in rem*, and the claim should be so certain and definite as to indicate with at least reasonable precision *the property that is to be subjected and the extent thereof*; without this it fails to furnish sufficient *data* for the entry of a judgment upon which the *levari* must issue for the sale of the property."

Sec. 383.

A mechanics' lien was filed indiscriminately "for oil-well supplies, oil, gas, water and steam fittings and pipe furnished to said West View Oil Co. for said oil wells, rigs, boilers, engines, machinery and fixtures

connected therewith and appurtenant thereto"; and in the descriptive part of the claim the subjects of the lien were described as "consisting of four excavators for wells and over each of these a wood-rig or derrick for the purpose of drilling or operating said wells when drilled, three boilers, four engines, connected by proper pipes and fittings to each other and to the walking-beam and bull-wheels of said derricks and the necessary machinery and fixtures for drilling, pumping, operating, cleaning and caring for said oil wells connected therewith and forming part thereof."

The bill of particulars annexed to the claim contained no statement indicating to which of the "improvements, engines," etc., the various items of the bill were furnished, nor at which of the wells the articles claimed for were delivered or used. *Held*, that the claim was too uncertain to sustain a lien under the act of February 17, 1858, P. L., 29. *Orth vs. Oil Co.*, 159 Pa., 388 (1893).

Doubted whether the casing in an oil well or the tubing and sand lines are of such a character as to admit of their being the subject of a lien.

Upon the latter point, Mr. Justice GREEN remarks :

"The casings may or may not remain in the well. If oil is not obtained, they are liable to be and probably are taken out and removed to some other well. As for the tubing and sand lines, they are, of course, unattached to any machinery and are only for temporary use at best." Quoting WOODWARD, C. J., in *Esterley's Appeal*, 54 Pa., 192 (1867), as follows: "In *Thomas vs. Smith*, 6 Wright (42 Pa.), 73, we said the word 'improvements' in this act was to have a reasonable construction and was not to be applied to temporary and insignificant additions, but to such permanent and substantial erections as do substantially augment the interest which the tenant has in the land."

Judge GREEN continues :

" These observations apply with, if possible, a greater force to the casings and lines used in boring and operating oil wells. When it is considered how large a proportion of the wells are only 'dry holes,' and are therefore abandoned at once, and all the machinery and appliances removed, and how large is the number of wells that yield so small a product as to be unprofitable to work, and they also are abandoned, and how many wells that have been for a time profitable to work have soon run down to an unprofitable production, and how many become exhausted in a short time, it is readily understood that no character of permanency can be attributed to such articles as casings, tubing and sand-lines. These are all as capable of use in one well as in another, and may be, and are constantly transferred from wells where they are of no use to others where they may be of service."

Sec. 384. Ohio.

Section 3184 of the Revised Statutes of Ohio provides as follows :

" A person who performs labor or furnishes machinery for constructing, altering and repairing * * * or for the digging, drilling or boring, operating, completing or repairing of any gas well, oil well or any other well, by virtue of a contract with the owner or his authorized agent, shall have a lien to secure the payment of the same upon such gas well, oil well or any other well, and upon the material and machinery so furnished, *and upon the interest of the owner of the lot or land upon which the same may stand*, or to which it may be removed."

Under this statute it was *held*, in *Devine vs. Taylor*, 12 Ohio C. C. R., 723 (1896), that an oil well, consisting of a hole in the ground down through the rock to the valuable material, the drive-pipe, casing and connecting tubing necessary to the construction and operation of the well and the other appliances constituting a part of the well itself, are bound by the lien as is the derrick.

CHAPTER XV.

NUISANCES.

Sec. 385. General Doctrine.

"The term nuisance, in legal phraseology, is applied to that class of wrongs that arise from the unreasonable, unwarrantable or unlawful use by a person of his own property, real or personal, or from his own improper, indecent or unlawful personal conduct, working an obstruction of or injury to a right of another or of the public, and producing such material annoyance, inconvenience, discomfort or hurt, that the law will presume a consequent damage." Wood on Nuisances (2nd Ed.), 1.

"Public or common nuisances affect the community at large, or some considerable portion of it, such as the inhabitants of a town; and the person therein offending is liable to criminal prosecution. A public nuisance does not necessarily create a civil cause of action for any person; but it may do so under certain conditions. A private nuisance affects only one person or a determinate number of persons, and is the ground of civil proceedings only." Am. & Eng. Cyc. Law, Vol. 16, 926.

Sec. 386. Where the Fact of the Public Nature is Controverted, a Jury should Decide.

The case of *Commonwealth vs. Miller*, 139 Pa., 77 (1891), was an appeal by defendants, owners and

operators of an oil refinery from a judgment ordering the abatement of the nuisance. The indictment charged that the refinery was a public and common nuisance, because of the emission therefrom of certain noxious and offensive smells and vapors, and because the oils and gases stored and used therein are inflammable, explosive and dangerous. As stated by Mr. Justice WILLIAMS, "the jury, under the instructions of the court, found the defendants guilty, and the sentence which has been pronounced requires the abatement or destruction of a plant in which some \$500,000 are said to be invested, and which gives employment to seventy-five men."

Said the court :

"The right to pure air is, in one sense, an absolute one, for all persons have the right to life and health, and such a contamination of the air as is injurious to health cannot be justified; but, in another sense, it is relative, and depends upon one's surroundings. People who live in great cities that are sustained by manufacturing enterprises must necessarily be subject to many annoyances and positive discomforts, by reason of noise, dust, smoke and odors, more or less disagreeable, produced by and resulting from the business that supports the city. They can only be relieved from them by going into the open country. The defendants had a right to have the character of their business determined in the light of all the surrounding circumstances, including the character of Allegheny as a manufacturing city, and the manner of the use of the river front for manufacturing purposes. If, looked at in this way, it is a common nuisance; it should be removed; if not, it may be conducted without subjecting the proprietors to the pecuniary loss which its removal would involve."

The rulings of the lower court were disapproved, the Supreme Court holding :

"1. While the continuance of a business, admitted or established to be a public nuisance, cannot be justified by the length of

time it has been in operation, by the capital invested in it, or by its influence upon the prosperity of the community, yet, where the fact of the public nuisance is controverted, these matters are proper for consideration by the jury.

" 2. A defendant, indicted for maintaining a public nuisance, by operating an oil refinery within city limits, is entitled to have the character of his business determined, not according to any abstract principle, but in the light of all the circumstances peculiar to the business, its place and its surroundings, and their use for manufacturing purposes.

" 3. It was, therefore, error, in such case, the fact of the public nuisance being denied, to charge that it is no defence to an indictment for maintaining a common nuisance, that the business complained of has been in operation for many years, that the size of the establishment made no difference, and that it was not a defence that the business was a useful one."

Sec. 387. A More Rigid Rule in the Case of Pipe-Lines.

The escape from a pipe-line of oil brought from a distance is not in any sense a natural and necessary development of the land, so as to make liability for injury caused by percolation of the oil into the premises of a neighboring proprietor depend upon negligence ; but it is a case of nuisance for which the pipe-line proprietor is liable, irrespective of negligence. *Hauck vs. Pipe Line*, 153 Pa., 366 (1893).

The court, in treating the case as a nuisance case, followed *Pottstown Gas Co. vs. Murphy*, 39 Pa., 257 (1861), in which a gas company was held answerable for consequential damages, such as the corruption of plaintiff's ground and well by the fluids percolating from the works and the important doctrine enunciated that a corporation is exempt from consequential damages only where, *being clothed with the State's right*

of eminent domain, it takes private property for public use, upon making proper compensation, and where such damages are not part of the compensation required.

R. R. Co. vs. Lippincott, 116 Pa., 472 (1887), and *R. R. Co. vs. Marchant*, 119 Pa., 559 (1888), were distinguished upon this ground, as cases of companies clothed with the right of eminent domain and expressly authorized by law to construct their roads and operate them. The court also followed *Robb vs. Carnegie*, 145 Pa., 324 (1891), in which the owners of coke ovens, the gases from which injured the growing crops upon the adjoining farm, were held liable in damages to the owner of the farm for the injury.

Sec. 388.

A leading case upon the subject is that of *Kinnaird vs. Standard Oil Co.*, 89 Ky., 468 (1890); 7 L. R. A., 451. It was an action to recover damages for the pollution, by defendant, of plaintiff's spring by the erection of a warehouse for the storage of oil that leaked from the casks and saturated the ground. In a well-considered opinion by PRYOR, J., reviewing *Brown vs. Illins*, 27 Conn., 84; *Dillon vs. Acme Oil Co.*, 49 Hun., 565; *Bloodgood vs. Ayers*, 108 N. Y., 400, and *Upjohn vs. Board of Health*, 46 Mich., 542, the court said:

"It seems to us, after a careful review of the authorities referred to by counsel for the corporation, all of which are entitled to just weight, that there is a manifest distinction between the right of the owner of land to use the underground water upon it that originates from percolation, or is found in hidden veins, and the right to contaminate it so as to injure or destroy the water when passing to the adjoining land of his neighbor."

The case of *Ballard vs. Tomlinson*, L. R., 29 Ch., Div. 115; 24 Am. L. Reg., N. S. 634, was referred to as containing the correct rule on the subject, and the point further illustrated by *Pottstown Gas Co. vs. Murphy*, 39 Pa., 257; *Ottawa Gas Light Co. vs. Graham*, 28 Ill., 74; *Columbus Gas Light Co. vs. Freeland*, 12 Ohio, 392, and it was finally adjudged that the defendant company was answerable in damages for the contamination of the spring.

Sec. 389. Negligently Permitting Leakage into Sewer and Generation of Gases Actionable.

In *Brady vs. Detroit Steel & Spring Co.*, 102 Mich, 277; 26 L. R. A., 175, it was *held* that negligently permitting the leakage of crude oil, kept for fuel, into the soil and thence into a public sewer, will create a liability for damages to a bakery, from gases generated by the oil in the sewer and escaping therefrom into the bakery.

In *Upjohn vs. Board of Health*, *supra*, Mr. Justice COOLEY recognizes the rule as well settled that the percolation of deleterious matter from the premises of the party who suffers it, through the soil upon the lands of an adjacent owner to the injury of the latter, is an actionable nuisance :

"The liability does not depend upon negligence. The reasonable precaution which the law requires is effectually to exclude the filth from the neighbor's land. *Ball vs. Nye*, 99 Mass., 582; 97 Am. Dec, 56; *Hodjkinson vs. Ennor*, 4 Best & S., 229; *Cahill vs. Eastman*, 18 Minn., 334 (Gil. 292), 10 Am. Rep., 134. *But all the cases in which this doctrine was applied were cases in which, consistent with a proper use of the premises, the exclusion was practicable.*"

Sec. 390.

The leading case upon the subject in Pennsylvania is *Penna. Coal Co. vs. Sanderson*, 113 Pa., 126 (1886), and although the nuisance complained of in that case arose from the operation of a coal mine, the reasoning of the court is just as applicable to a case of the defiling of a stream by oil producers, as we shall presently see.

It was *held* that damages resulting to another from the natural and lawful use of land by the owner, in the absence of malice or negligence, are *damnum absque injuria*; that one operating a coal mine in the ordinary and usual manner may, upon his own lands, drain or pump the water which percolates into his mine into a stream which forms the natural drainage of the basin in which the mine is situate, although the quantity of the water may thereby be increased and its quality so affected as to render it totally unfit for domestic purposes by the lower riparian owners; that the use and enjoyment of a stream of pure water for domestic purposes by the lower riparian owners, who purchased their land, built their houses and laid out their grounds before the opening of the coal mine, the acidulated waters from which rendered the stream entirely useless for domestic purposes, must *ex necessitate*, give way to the interests of the community in order to permit the development of the natural resources of the country and to make possible the prosecution of the lawful business of mining coal.

This conclusion, however, was not reached without the strong dissent of three of the seven justices composing the court, and the overruling of a previous judgment of the court in the same cause, reported in 86 Pa., 401 (1878). Both opinions are learnedly

written, and will repay careful examination. A vital distinction, however, is that to which attention is called in the case next to be noted, namely, that if the public, or anyone having the authority to represent it, were the complainant, "a very different question would be presented." Said the court :

"We do not say that a cause may not arise in which a stream from such pollution *may not become a nuisance*, and that the *public interests, as invoked in the general health and well-being of the community*, may not require the abatement of that nuisance."

Sec. 391.

In *Union Water Co. vs. Enterprise Oil Co.*, 38 Pitts. L. J., 159 (C. P., Beaver Co.), it was *held* that an injunction will not be granted at the instance of an incorporated water company, to prevent oil producers from defiling with salt water the stream from which the company draws its water supply, it appearing that oil cannot be brought to the earth save in combination with salt water, which is afterwards necessarily discharged from the receiving tanks, and finds its way into the stream.

Per WICKHAM, P. J.:

"The fact that the plaintiff is required by law to furnish pure water to the public so long as it chooses to remain in the business of supplying that article, does not confer upon it the rights of a municipality engaged in furnishing water to its own citizens. *Haupt's Appeal*, 125 Pa. St., 211. A similar requirement exists in the case of incorporated gas companies. The plaintiff is merely a private corporation, organized and acting for gain; clothed, it is true, with certain rights of eminent domain, and owing certain duties to the public. It has no standing to represent the public, or to file a bill in its behalf. *Haupt's Appeal*, *supra*. It cannot, in this proceeding, be heard to complain of anything save the alleged injury to its own private interests; hence the rule laid down

in *Pennsylvania Coal Co. vs. Sanderson* must be allowed to govern the case. The courts may not strangle the extensive and useful business of producing oil from the one hundred foot sand, simply to render the business of the plaintiff successful."

Sec. 392. Subterranean Supplies of Water.

An injury caused to a *subterranean* supply of water by the lawful acts of an owner of land, resulting in damage to his neighbor, is *damnum absque injuria*.

Whenever the subterranean water is so hidden that its course cannot be discovered from the surface, no distinctions can be drawn between ordinary percolations and a subterranean current or stream, and in such case there can be no such thing as prescription in favor of an adjacent proprietor to have an uninterrupted flow of such water through his neighbor's land. *Lybe's Appeal*, 106 Pa., 626 (1884).

Sec. 393. *Damnum Absque Injuria* Applicable only in the Absence of Negligence.

But the rule of *Penna. Coal Co. vs. Sanderson* does not exempt a land-owner from all obligation to pay regard to the effect of his mining operations on subterranean waters. The distinction between rights in surface and subterranean waters is not founded on the fact of their location above or below ground, but on the fact of *knowledge*, actual or reasonably acquirable, of their existence, location and course; in either case, the rule of *damnum absque injuria* applies *only in the absence of negligence*. *Collins vs. Chartiers Valley Gas Co.*, 131 Pa., 143 (1890); citing *Wheatley vs. Baugh*, 25 Pa., 528; *Haldeman vs. Bruckhardt*, 45 Pa., 514.

If a person boring for oil or gas have knowledge that neighboring water wells are supplied from a *stratum* of clear water underlying his land, and that there is a deeper *stratum* of salt water likely to rise and mingle with the fresh, when penetrated in such boring, and may prevent this mingling by a reasonable outlay, his failure to use the means therefor is negligence. *Ibid.*

In *Windfall Mfg. Co. vs. Patterson, Ind.*, 47 N. E. R., 2 (1897), the Supreme Court of that State ruled that drilling a gas well for a brick and tile factory already established, at a distance of one hundred and fifty-two feet from a residence, is not a nuisance *per se*, and will not be enjoined, danger being apprehended only in case gas, oil or water be found, and it not being certain that either will be found, and it not being shown that, if found, it cannot be controlled and managed so as to cause no appreciable injury to any one.

The opinion is by HOWARD, J., and is a valuable review of the authorities in point. Upon the circumstances of the case he says :

“The appellant, in locating its brick and tile works, for which natural gas was to be used as a fuel, selected a place retired from all residences, and then erected its plant and machinery at great expense. The business so commenced was continued for three years before appellees came and erected their dwelling upon land across the highway from appellant's land and within two hundred feet of its brick and tile works.” * * * “While this circumstance is not controlling, yet it is one that must be taken into consideration.” * * * “Experience has shown that gas wells are of short life, and that, after the failure of one well, another, in order to be successful, must be located at a considerable distance from the first.” * * * “It is to be remembered that before a court of equity will restrain a lawful work from which merely

threatened evils are apprehended, the court must be satisfied that the evils anticipated are imminent and certain to occur. An injunction will not issue to prevent supposed or barely possible injuries."

* * * "If the well can be sunk and the gas, oil or water therefrom, if any, can be so controlled and managed as to cause no appreciable injuries to appellees or to any one else, then such reasonable and lawful use of property ought not to be prevented by the courts. To do so would be usurpation of arbitrary power."

Sec. 394. Pipe-Line—Increase in Insurance Rates.

A pipe-line for the transportation of oil is not rendered a nuisance by the mere fact that its presence enhances the rates of insurance on property in the neighborhood. *Benton vs. City of Elizabeth, N. J.*, 39 Atl. R., 683 (1898).

Sec. 395. Waste of Gas on Private Property a Public Nuisance.

The latest, and certainly a most novel and interesting case upon the subject of nuisances is that of *State vs. Ohio Oil Co., Ind.*, 49 N. E. R., 809 (1898). The opinion should be carefully read, not only upon the point now under consideration but in connection with the general subject of the nature and right of property in natural gas; its history since its discovery in Indiana in 1886; the necessity of its economical use as a fuel and its importance as a source of wealth, public and private.

The complaint was brought under Indiana statutes (Burns' Rev. St., 1894, Secs. 290, 292; Horner's Rev. St., 1897, Secs. 289, 291), providing that whatever is injurious to health, or offensive to the senses, or an obstruction to the free use of property, is a nuisance, and may be enjoined or abated. It

charged that the defendant company had caused a well to be drilled, and instead of securely anchoring it, had, since its completion, permitted the gas to escape into the open air, whereby many millions of cubic feet of gas had been wasted and lost, the State's supply of gas diminished and the property of citizens dependent upon the supply of such gas for fuel, damaged and decreased in value; that the permitting of such escape, after two days from the striking of oil or gas, was forbidden by another statute (Burns' Rev. St., 1894, Secs. 2316-2318, 7510-7512); that defendant avowed its purpose to permit such gas to escape continuously, and to drill other wells and permit the gas to escape therefrom; that the statutory remedies for such unlawful acts were wholly inadequate, and that such wrongful conduct, if not restrained, would result in the destruction of such supply of gas and thereby essentially interfere with the property of the State and of its citizens.

It was *held* that such facts constitute a public nuisance, which should be abated by injunction.

Per M'CABE, J.:

"Appellee's counsel have conceded that the pressure in gas wells, since the discovery of gas in this State, has fallen from 350 to 150 pounds. This very strongly indicates the possibility, if not the probability of exhaustion. In the light of these facts, one who recklessly, defiantly, persistently, and continuously wastes natural gas, and boldly declares his purpose to continue to do so, as the complaint charges appellee with doing, all of which it admits to be true by its demurrer, ought not to complain of being branded as the enemy of mankind. But the appellee tries to excuse its conduct on the score that it cannot mine and utilize the oil under and in its land without wasting the gas. But there is nothing in the record to bear out that claim. However, if there were, it would not furnish a valid excuse. It is not the use of unlimited quantities

or gas that is prohibited, but it is the waste of it that is forbidden. The object and policy of that inhibition is to prevent, if possible, the exhaustion of the store-house of nature, wherein is deposited an element that ministers more to the comfort, happiness and well-being of society than any other of the bounties of earth. Even if the appellee cannot draw oil from its well without wasting gas, it is not denied that it may draw gas therefrom, and utilize it without wasting the oil. But even if it cannot draw oil from such wells without wasting gas and is forbidden by injunction so to do, it is only applying the doctrine that the owner must so use his own property as not to injure others. It may use its wells to produce gas for a legitimate use, and must so use them as not to injure others or the community at large. The continued waste and exhaustion of the natural gas of Indiana through appellee's wells would not only deny to the inhabitants the many valuable uses of the gas, but the State, whose many *quasi*-public corporations have many millions of dollars invested in supplying gas to the State and its inhabitants, will suffer the destruction of such corporations, the loss of such investments and a source of large revenues. To use appellee's well, as they have been doing, they injure thousands, and perhaps millions, of the people of Indiana, and the injury—the exhaustion of natural gas—is not only an irreparable one, but it will be a great public calamity. The oil appellee produces is of very small consequence as compared with that calamity which it mercilessly and cruelly holds over the heads of the people of Indiana, and, in effect, says: 'It is my property, to do as I please with, even to the destruction of one of the greatest interests the State has, and you people of Indiana, help yourselves if you can. What are you going to do about it?'

"We had petroleum oil for more than a third of a century before its discovery in this State, imported from other States, and we could continue to do so if the production of oil should cease in this State. But we cannot have the blessings of natural gas unless the measures for the preservation thereof in this State are enforced against the lawless. We therefore conclude that the facts stated in the complaint make a case of a public nuisance which the appellant has a right to have abated by injunction, and that the complaint states facts sufficient to constitute a cause of action."

CHAPTER XVI.

OPTIONS.

Sec. 396. Nature.

An option is an unaccepted offer stating the terms and conditions on which the owner is willing to sell or lease his land, if the holder elects to accept them within the time limited. If the holder does so elect, he must give notice to the other party, and the accepted offer becomes a valid and binding contract. If an acceptance is not made within the time fixed, the owner is no longer bound by his offer, and the option is at an end. *M' Millan vs. Philadelphia Co.*, 159 Pa., 142.*

Sec. 397. Language Construed to Create an Option— Lessee Permitted to Set Up His Own Default.

Where a five years' lease provided that "lessee shall complete a well within six months from the date hereof, or, in default thereof, pay to the party of the first part, *for further delay*, an annual rental of \$700, in advance, on the said premises, from the time above specified" until completion, and a failure to complete or pay rental for ten days after the time above specified for so doing, to render the agreement null and void, and only to be renewed by mutual consent, and no right of action after such failure to accrue to either

* For a statement of the facts in this case, see title "Forfeiture."

party on account of the breach of any covenant, it was *held* that the clause meant that the lessee should have an option to put down a well within six months from the date of the lease, and by paying \$700, the further option for one year. *Van Voorhis vs. Oliver*, C. P., Ally. Co., 39 Pitts. L. J., 114 (1891).

Quoting CLARK, J., in *Wills vs. Mfrs. Nat. Gas Co.*, 130 Pa., 122 :

"No case has been called to my attention which recognizes the doctrine that a party may take advantage of his own wrong, or set up his own default to work a forfeiture of his own contract. Persons may, of course, contract in this form and to this effect, if they choose."

And *Ray vs. Gas Co.*, 138 Pa., 476 :

"Persons may, perhaps, contract expressly in this form and to this effect. When they do, the transaction amounts to a mere option, and the lessee, in setting up his own default, *simply avails himself of an elective right secured to him in his contract.*"

Sec. 398.

Where a lease contained the following clause annexed to the *habendum* :

"Provided, however, that this lease shall become null and void ; and all rights hereunder shall cease and determine, *unless* a well shall be completed on said premises within one month from the date hereof, *or unless* the lessee shall pay at the rate of \$100 monthly, in advance, for each additional month such completion is delayed, from the time above mentioned for the completion of said well, until a well is completed,"

it was *held, inter alia*, that at most this contract is only an option, revocable at the pleasure of the lessee. *Glasgow vs. Griffith*, C. P., Butler Co., 39 Pitts. L. J., 181 (1891).

Per HAZEN, P. J. :

"This agreement or contract may be very imprudent, but with this we have nothing to do ; we cannot read into this contract,

agreements, covenants or promises, which the parties thereto left out of it; it is enough that the court interpret and enforce it as made by the parties thereto."

Sec. 399. General Doctrine.

The general subject of options is discussed at length in the case of *Barrett vs. McAllister*, 33 W. Va., 738 (1890). The following general principles are laid down :

1. A unilateral contract, commonly called an option, must be accepted within the time specified therein, and notice of such acceptance given to the proposer within the same period; otherwise, the option is at an end.

2. The obligation of such proposer to deliver a deed, and the obligation of the holder of the option to pay the money, are mutual and dependent, and are to be performed simultaneously.

3. A third party who, *with notice of such equity* of the holder of such option, purchases the land from such proposer, takes it subject to the rights of the holder of the option, and holds it in trust for him, and the latter may in equity follow the land into the second purchaser's hands and compel him to convey the land to him.

4. In a suit in equity against the proposer of such option and the second purchaser, the holder of such option may pray for the specific execution of the contract by a conveyance of the land to him from them, or, in the alternative, for the purchase money, which the second purchaser agreed to pay, and the one or the other relief may be decreed according to circumstances, or as the plaintiff may elect. But, in case there shall be a decree, not for specific execution, but

for money, the decree must be against the proposer in such option, and not against him and the second purchaser, or against the latter alone.

5. In case of such a decree for money and not for specific execution, it is proper to hold the land bound for its payment, and to decree its sale for non-payment.

Weaver vs. Burr, 31 W. Va., 736 (8 S. E. Rep., 743) (1888), is considered, and the following language is used:

"If *Weaver vs. Burr* is to be construed as holding that tender within the period stipulated is indispensable to the life of the contract in the case of mutual and dependent covenants, on the one side to pay purchase-money and on the other side to convey land, notwithstanding the vendor is not ready to deliver his deed and is unable to do so within the period, we think it goes too far and does not propound sound law." "It was just as much the duty of McAllister (the proposer) to have a deed ready for delivery in his outstretched hand, as for Barrett (the holder of the option) to have money ready for delivery in *his* outstretched hand. Both hands must be outstretched at the same time."

Sec. 400. Time of the Essence of the Option, but Not the Performance.

In *Smith's Appeal*, 69 Pa., 474 (1871), Smith agreed to sell Raydure land, "Raydure to have the refusal ten days from date." *Held*, that time was of the essence of the contract as related to the option, but not as to performance.

Sec. 401. Option—License—Conveyance to Another Equivalent to Revocation.

An agreement giving plaintiff the right to enter and prospect for minerals, and, if he be of opinion

that they are worth working, then to work the same on shares, was held to amount to a mere license, and plaintiff was bound to exercise his option within a reasonable time, and, in case of his failure, the other party might revoke the license. A conveyance of the land by the latter amounted to such a revocation, and ten years was not a reasonable time within which plaintiff could exercise his option. *Cahoon vs. Bayand*, 123 N. Y., 298 (1890).

Sec. 402. Option to Buy at the End of Term Assignable.

A lease contained a stipulation that the lessee, at the end of the term, might have a conveyance of the premises at a specified price. He assigned the lease. *Held*, that the assignee was entitled to a conveyance. *Napier vs. Darlington*, 70 Pa., 64 (1871).

"The agreement giving the option to purchase was not a mere personal covenant, but a right which, though resting solely with the lessee, might be transferred to his vendee and enforced at his election, with the same effect as if the contract had been absolute in its terms. Such a stipulation in a lease is in the nature of a continuing offer to sell, and, when accepted by the lessee, a contract of sale is completed." *Kerr vs. Day*, 2 Harris, 112; *Willard vs. Taylor*, 8 Wall., 557.

Sec. 403. Option to Buy Oil—Gambling Scheme.

Contract to deliver oil at any time within a fixed period. *Held*, a bargain for such an option may be legitimate, but its character may be weighed in connection with other evidence on the question whether the transaction was a gambling scheme. *Kirkpatrick vs. Bonsall*, 72 Pa., 155 (1872).

Sec. 404. Alternatives and Contingencies.

Upon the following provision :

“After the first well is completed, provided it is a paying well, said second party shall have the privilege of buying or leasing the remainder of said Schuler farm, provided he and said Schuler can agree upon the terms within six months.”

It was *held* that it did not confer an option in the ordinary sense of the word ; nor did it offer lessee the remainder of the farm, upon definite terms of purchase or of lease on royalty, that he may accept within a time limited, and so become, by virtue of such acceptance, a purchaser or lessee. *Childs vs. Gillespie*, 147 Pa., 173 (1892). Distinguishing *Carson vs. Mulvaney*, 49 Pa., 88 ; *Napier vs. Darlington*, 70 Pa., 64.

Sec. 405. The Law Favors Prompt Action upon Options on Property of Fluctuating Value.

Said MILLER, J., in *Twin-Lick Oil Co. vs. Marbury*, 91 U. S. R., 592 (1875):

“The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands to-day is worth nothing to-morrow ; and that which we to-day sell for a thousand dollars as its fair value, may by the natural changes of a week, or the energy and courage of desperate enterprise, in the same time, be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit.

“While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvement, and but little change in value, the class of property here considered, subject to the most rapid,

frequent and violent fluctuations in value of anything known as property, requires prompt action in all who hold an option, whether they will share its risks or stand clear of them."

Sec. 406. The Same.

And, in *Johnston vs. Standard Mining Co.*, 148 U. S. R., 360 (1893), this language was quoted with approval, the court, through Mr. Justice BROWN, summing up the doctrine as follows :

"Where property has been developed by the courage and energy, and at the expense of the defendants, courts will look with disfavor upon the claims of those who have lain idle while awaiting the results of this development, and will require not only clear proof of fraud, but prompt assertion of plaintiff's rights."

The cases of *Hoyt vs. Latham*, 143 U. S. R., 567 (1892); *Hammond vs. Hopkins*, Id., 224 (1892), and *Felix vs. Patrick*, 145 U. S. R. 317 (1892), are to the same effect, and contain valuable citations and reviews of the authorities in point. As they do not directly concern mining lands, however, they need not receive further examination here.

Sec. 407.

The following authorities on the point of the necessity of the exercise of the right of rescinding or avoiding a contract as soon as it may reasonably be done, after the party with whom that right is optional is aware of the facts which give him that option, may be consulted with profit: *Badger vs. Badger*, 2 Wall., 87; *Harwood vs. R. R. Co.*, 17 Wall., 78; *Marsh vs. Whitman*, 21 Wall., 178; *Vigers vs. Pike*, 8 Cl. & Fin., 650; *Wentworth vs. Lloyd*, 32 Beav., 467; *Follansbee vs. Kilbreth*, 17 Ill., 522; *Bliss vs. Edmonson*, 8 DeG. M. & G., 787.

CHAPTER XVII.

REMEDIES.

Perhaps in no branch of the law has the growth of equitable jurisdiction, so much commented upon in late years by judges and text-writers, been more steady and, upon the whole, more acceptable to the profession, than in litigation growing out of oil and gas operations. No one can read the earlier cases where the plaintiff, with acknowledged rights, is remitted to his "remedy" at law against, it may have been, an insolvent defendant, or where, instead of trover, counsel had improvidently brought ejectment, or case instead of *assumpsit*, and then turn to *Johnston vs. Price*, *infra*, without being impressed with the effort of the courts of this day to render prompt and substantial justice. The former method, with its fine distinctions which counsel could never hope to explain to client, was often a denial of justice outright—admitting the legality of a demand, but adjudging that it could be recognized only after months of wearying attempts to induce thirteen men to agree upon a proposition just as readily resolvable by one of them, by whom the decision of the other twelve could be annulled if he did not concur in their views.

To those who do not favor this enlargement of the scope of equitable relief, it may be suggested that the substance of the old distinction still exists, and that the courts still close the doors of equitable procedure

if the remedy at law comes up to the single requirement, adequacy—which, after all, embraces the others. And further, as suggested by the Supreme Court of Pennsylvania more than once, the controlling consideration is that the courts must continue in even step with the rapid increase in the methods for the conduct of the oil business; must familiarize themselves with, and adapt their machinery to, those methods, so that, when called upon for relief in a case at once complicated and involving large property rights, with, as often happens, parties before them as “fugacious” as the subject-matter of the controversy, they may not hesitate to grant the relief prayed for in a substantial form.

As a corollary to *Johnston vs. Price*, the ruling in *Kleppner vs. Lemon*, 176 Pa., 502 (1896), was made most aptly a few months later; and while Mr. Justice MITCHELL dissents upon the merits of the case, he makes no objection to the form of procedure selected by the complainants. The case is considered at length in the chapter on the “Obligation of Lessee,” and it is not now necessary to do more here than allude to the fact that by the simple process adopted by the court of putting the lessee upon terms, in default of the observance of which in ten days he should be held to have abandoned his leasehold, a result was accomplished which, it is safe to say, judging from the character of similar transactions and the parties concerned, could never have been attained otherwise.

Sec. 408. The Enlargement of Equitable Jurisdiction.

The idea is clearly and forcibly expressed in the case of *U. S. vs. Bloomfield Gravel Mining Co.*, U. S. Cir. Ct. Mid. Dist. Tenn., 81 Fed. R., 243 (1897).

That was a case where the State officers failed to enforce the law against brokerage in railroad tickets, whereupon the railroads brought suit in the federal court to enjoin the traffic as unlawful. The court granted the injunction, and in answering that such a proceeding was novel and unprecedented, said :

“ I return now to the argument based on the ground that this is a novel application of the injunction, not sanctioned by previous precedent directly in point. This argument, carried to its full logical result, would have prevented the enunciation of the first equitable principle and the establishment of the first equitable precedent for the preventive remedy. It is, indeed, an age-worn argument. It has been employed from the beginning of equity jurisprudence as a part of the objection to the extension of the equitable remedy to new conditions and new cases. This is the well-known history of the subject. Of course, this contention has been overruled, and precedent after precedent established from time to time to meet new conditions and to do full justice, until the argument has long since lost most of its force, *although it is still maintained in form*. It has been in answer to arguments like this that the great chancellors have stated time and again that they decline to lay down any definite rules as to when a court of equity will interpose by injunction. In fact, to do so would at once put a limit to all progress in equitable jurisprudence. The most that has been said is that in the use of the writ of injunction the court exercises sound discretion regulated by analogy—by what would be manifestly just in view of all the existing conditions—and requiring as a condition that there is no adequate remedy at law. Beyond this the courts have not gone, in the way of placing a limit on their power. It must be recognized that jurisprudence, both legal and equitable, both in respect of the right and the remedy, is progressive, that it is expansive, and that, while its great principles remain good for one time as well as another, these principles must be extended to new conditions, and this involves an extension of the remedy and often a change in the form of the remedy. Making the injunction mandatory as well as preventive is an example of such a change. Any system of jurisprudence coming short of this would fail to meet the demands of civilization.” Citing *Joy*

vs. *St. Louis*, 138 U. S. R., 1 (1891); *Toledo, etc., Ry. Co. vs. Penna. Co.*, 54 Fed. R., 746 (1893); *Ry. Co. vs. M'Connell*, 82 Fed. R., 76 (1897); Cf. *Columbian Athletic Club vs. State*, 143 Ind., 98.

Sec. 409. The Doctrine as at Present Held.

That the growth of equitable jurisdiction has been steady in the direction of the number of the matters of controversy which it recognizes, and the methods of granting relief, the student of procedure will readily ascertain from an examination of the decisions. It is not within the scope of a work like the present to follow this growth from case to case; that must be left to treatises upon that special branch. We can examine here only those cases relating to and establishing the law upon the subject in hand. Probably the most important among them and that containing the fullest exposition of the differing forms of remedy between tenants in common is *Johnston vs. Price*, 172 Pa., 427 (1896), where it was *held* upon a bill in equity for discovery, and an account between tenants in common of an oil and gas lease, that

1. In order to oust the jurisdiction of a court of equity, the remedy, or supposed remedy at law, must be full, adequate and complete. Citing *Kirkpatrick vs. M' Donald*, 11 Pa., 387 (1849).

2. Equitable jurisdiction does not depend upon the *want* of a common law remedy, but may be sustained on the ground that it is the most *convenient* remedy. *Electric Co.'s Appeal*, 114 Pa., 574 (1886).

3. The extension of the remedy at law to cases originally within the jurisdiction of a court of equity is no bar to a chancery proceeding for the same cause. *Church vs. Moore*, 10 Pa., 273 (1849).

4. Equity seeks to prevent unnecessary litigation by disposing in one proceeding of all the questions that may arise affecting many persons. *Bierbower's Appeal*, 107 Pa., 14 (1884); *Harper's Appeal*, 109 Pa., 9 (1885).

5. There must not only be a remedy at law, but it must be adequate and reasonably convenient. *Warner vs. McMullin*, 131 Pa., 370 (1890); *Drake vs. Lcoe*, 157 Pa., 17 (1893).

It was further *held* that

6. Where the plaintiffs and defendants are the owners as tenants in common of an oil lease, and are also partners in the machinery and appliances for developing the oil, and in the business of buying and selling the oil produced from the well, and both parties have expended money upon the enterprise, but defendants refuse to furnish plaintiffs with any statement of their expenditures, plaintiffs have a standing in equity for a discovery and for a settlement of accounts.

7. The Pennsylvania Act of May 6, 1891, entitled "An act authorizing actions *in assumpsit* by and against joint owners, joint tenants and tenants in common, holding an interest in and operating any drilling, pumping or producing oil or gas well," does not apply to a case involving the settlement of accounts between the tenants in common of an oil lease, who are also partners in the business of mining and selling the oil produced from the leasehold estate.

8. The act is limited (1) to claims by strangers to the enterprise, who furnish labor or material to several parties jointly interested, and (2) to a claim by one of several joint owners against another joint owner, whose share he has paid.

Sec. 410. The Same.

Then came the case of *Harrington vs. Florence Oil Co.*, 178 Pa., 444 (1896), which enunciates distinctly the broad proposition that a bill in equity will not be dismissed for want of jurisdiction after reference to a master, the taking of a large amount of testimony and the incurring of heavy costs, *although the controversy concerns merely an alleged breach of contract and a claim for unliquidated damages.*

An equally distinct ruling is made to the effect that where an action of account render will lie in Penn-

sylvania between tenants in common, a court of equity has concurrent jurisdiction.

Attention must be called to the fact, however, that this ruling is based in terms upon the act of October 13, 1840, providing that "courts shall have the powers and jurisdiction of courts of chancery in settling * * * such account and claims as by the common law and usages of this commonwealth have been settled by the action of account render," and the plaintiff may "proceed *either by bill in chancery or at common law.*" But the *dictum* in *Baker vs. Biddle*, Baldwin (U. S.), 394, seem to leave the act out of consideration: "It may be said in general that in all cases where the action of account render would be the proper remedy, the jurisdiction of equity is undoubted." See, also, *Reeside vs. Reeside*, 49 Pa., 322 (1865); *Fisher's Appeal*, 88 Pa., 146 (1878); *Adams' Appeal*, 113 Pa., 449 (1886).

Sec. 411. General Statement as to Distinction Between Equitable and Legal Remedies.

A court of equity has no jurisdiction of a bill in equity brought by one tenant in common against an alleged co-tenant to obtain the possession and enjoyment of mining rights and privileges, founded on a legal title, until those rights have been established at law. The remedy of the complainant is at law, whether his rights are corporeal or incorporeal, and amounting to an interest in the coal and minerals in the land charged in the bill; where the title is legal, the case is not within the jurisdiction of a court of equity. And an act giving a tenant in common in coal or iron mines, whose right is denied, power to apply by petition in equity for the determination of the rights of

the several parties, according to the course of a court of chancery (Pamphlet Laws Pennsylvania, 1856, p. 502), conflicts with the constitutional right of the citizen to have controverted questions of fact in common law cases decided by a jury, and is applicable only to cases in which the rights of the complainant are equitable. *Coal Co. vs. Snowden*, 42 Pa., 488 (1862).

Courts of equity have concurrent jurisdiction with courts of law in matters of account where the accounts are mutual and complicated, and also where they are all on one side only, but discovery is sought and is material to relief; but where the accounts are all on one side, and no discovery is sought or required, the case is not one for a court of equity. *Gloninger vs. Hazard*, 42 Pa., 389 (1862).

Sec. 412. The Same—As to Opposing Claims for the Possession of Oil Property.

In Pennsylvania equity has no jurisdiction of a bill to restrain the operation of oil wells or the taking of oil therefrom, where the complainant's title is purely legal, the respondent is solvent and there are neither complicated accounts nor such irreparable injury as will warrant interference by injunction. The substantial purpose of such a bill being to recover possession of the wells, the remedy by ejectment, aided by writ of estrepement, under the State statutes is full and adequate. *Erskine vs. Forest Oil Co.*, U. S. C. C., W. D. Pa., 80 Fed. R., 583 (1895).

Discovery is not ordinarily an independent ground of equitable relief, and where a bill presents no other ground for equitable interference, equity will not take jurisdiction merely because a discovery is prayed for. *Ibid.*

An injunction is not of right, but of grace, and will never be issued by a court of equity where it will inflict a greater injury than it will prevent. *Robb vs. Carnegie*, 145 Pa., 339 (1891).

As to this expression, however, the same court, in *Walters vs. M'Elroy*, 151 Pa., 557 (1892), speaking through Mr. Justice HEYDRICK, said :

“The phrase ‘of grace’ predicated of a decree in equity had its origin in a day when kings dispensed their royal favors by the hands of their chancellors, but, although it continues to be repeated occasionally, it has no rightful place in the jurisprudence of a free commonwealth, and ought to be relegated to the jurisprudence of an age in which it was appropriate. It has been somewhere said that equity has its laws as law has its equity. This is but another form of saying that equitable remedies are administered in accordance with rules as certain as human wisdom can devise, leaving their application only in doubtful cases to the discretion, not the unmerited favor or grace of the chancellor. Certainly no chancellor in any English-speaking country will, at this day, admit that he dispenses favors or refuses rightful demands, or deny that when a suitor has brought his cause clearly within the rules of equity jurisprudence, the relief he asks is demandable *ex debito justitiæ*, and needs not to be implored *ex gratia*.”

Sec. 413. Equitable Jurisdiction Once Obtained Will be Retained—Multiplicity of Suits.

A court of equity, having obtained jurisdiction for one purpose, will retain it generally for relief, as well in cases of continuing trespass and waste as in cases of fraud, accident, mistake and account. *Allison & Evans' Appeal*, 77 Pa., 221 (1874).

Per MITCHELL, J.:

“To prevent multiplicity of suits, the court will decree an account of the damages or waste done, at the same time with an injunction, and proceed to make a complete decree, so as to settle

the entire controversy between the parties. This is the doctrine not only of courts of equity having general chancery jurisdiction, but of this court, *under the equitable powers conferred by the legislature.* * * * Why then should we hold that the power of the court for relief ceased with the injunction? If the statutes giving chancery powers in injunctions and matters of account do not, as contended, expressly give the power to decree damages against tort-feasors, they give in express terms 'power and jurisdiction of courts of chancery so far as relates to the prevention or restraint of the commission or continuance of acts contrary to law and prejudicial to the rights of individuals.' If, incident to the right of injunction in such cases, courts of chancery decree an account of the damages or waste done, is it an unreasonable construction of the statute to hold that the legislature, in giving the power and jurisdiction which it confers, intended that it should be exercised as fully and with the same incidents as it is by courts of chancery in like cases? There is no more difficulty in taking an account of the damages in cases of waste and continuing trespass than there is in settling a partnership or other account or claim of which equity has jurisdiction."

Sec. 414. Bill for Account of Profits Does Not Lie in Cases of Mistake as to Boundaries, but Upon Proper Cause Shown, Equity will Relieve.

In the case of a mutual mistake between lessor and lessee as to the location of a well, it appeared by a subsequent survey that it was not within the lines of the lease, whereupon lessees offered to deliver possession and refused to pay a royalty. Lessors filed a bill for account of profits. *Held*, that the bill should have been dismissed and the lessors left to their remedy at law. PAXSON, J., saying:

"The lessors have invoked the aid of a court of equity. We think they have chosen the wrong tribunal. * * * We have here a mutual mistake upon a matter that was of the very essence

of the contract. It is in just such cases that equity relieves against the hard rules of the common law. But, as before observed, it is the lessors who are seeking the aid of equity to enforce their contract, notwithstanding the existence of this admitted mutual error affecting the life of the contract itself. They appeal to the conscience of a chancellor to make an unconscionable decree. For, if we make the decree prayed for, it would not protect the lessees from a suit from the owner of the well for the royalty, and they would be without remedy. It needs no argument to show that these complainants have no equity. We leave them to their remedy at law." *Mays vs. Dwight*, 82 Pa. (1876). See, also, *Hill vs. Proctor*, 10 W. Va., 59 (1877), *supra*.

Sec. 415. Tenants in Common—Pennsylvania Act of April 25, 1850.

The act of April 25, 1850 (P. L., 573), giving the courts jurisdiction in equity over the settlement of accounts between tenants in common of mines and minerals, and empowering them to "cause to be ascertained the quantity and value of the coal, iron ore or other minerals, so taken respectively by the respective parties and the sum that may be justly and equitably due by, and from, and to, them respectively therefor, according to the respective proportions and interests to which they may be respectively entitled in the lands," seems to be considered in *Bank vs. Osborne*, 159 Pa., 10 (1893), as applicable to tenants in common of an oil lease, though oil was not discovered for nearly ten years after the passage of the act. *Gill vs. Weston*, 110 Pa., 312, *held*, as we have seen, the act of April 27, 1855, applicable to mortgages of leaseholds of oil property, and the same reasoning would seem to apply to that above mentioned.

Sec. 416. The Same.

A, dying intestate, left him surviving a widow and children. Included in his estate were coal lands upon which mines were opened. The grantees of the children went into possession of these lands and mined them without any objection on the part of the widow. After nearly all the coal was mined, the widow filed a bill in equity under the act of April 25, 1850, for an accounting. *Held*, that she was not entitled to compel defendants to account as trespassers, but only as co-tenants. *M'Gowan vs. Bailey*, 179 Pa., 471 (1897).*

Sec. 417. The Doctrine in West Virginia Substantially the Same.

To warrant the interference of a court of equity to restrain a trespass, two conditions must co-exist: First, the plaintiff's title must be undisputed or established by legal adjudication, and, second, the injury complained of must be irreparable in its nature. *Kemble vs. Cresap*, 26 W. Va., 603 (1885).

The existence of a controverted boundary does not constitute a sufficient ground for the interposition of courts of equity to ascertain and fix that boundary. It is necessary to maintain such a bill that some peculiar equity should be made manifest. There must be some equitable ground attaching itself to the controversy. *Hill vs. Proctor*, 10 W. Va., 59 (1877).

It is not sufficient that the bill contain mere general averments of irreparable mischief, but the facts constituting such mischief must be set forth.

* These cases, from the standpoint of the *quantum* of interest in the co-tenants, are both treated more fully under the heads of Partnership and Tenants in Common.

Watson vs. Ferrell, 34 W. Va., 406 (1890), approves the foregoing decisions, and in an opinion by ENGLISH, J., it is said :

“Although no demurrer be interposed, the court will dismiss the bill at the hearing, if the court appears to have no jurisdiction. What, then, should be the result in this case when, as before stated, the defendant’s answers are filed, and the pleadings and proofs show conclusively that the title is claimed by both plaintiff and defendant, and that the parties have gone into a court of equity to settle the title to the land?”

Nevertheless, and the principle, as we shall see, is sustained by the spirit of later decisions of other courts, being placed on the ground of the inadequacy of the remedy at law—the same court ruled that when a lessee, by the terms of his lease, is restricted to a particular use of the demised premises, equity will restrain him from any other use of them, even though no irreparable injury be shown to result from such breach. *Frank vs. Brunnemann*, 8 W. Va., 462 (1875).

Sec. 418. Proceedings to Quiet Title—Ohio.

A person in peaceable possession of real estate under a defective deed may have his title quieted by action, as against a stranger who makes claim to such real estate, but has no right or title thereto.

The term of the grant in an instrument conveying the sole right to produce petroleum and natural gas having expired, and the grantees still claiming a right to drill under such grant, the grantor has a right to have his title quieted as against such claim on the ground of the expiration of the right, without resorting to the law of forfeitures.

Under such an instrument the sum paid as consideration for the grant need not be returned in order to maintain an action to quiet title.

Expenses incurred by the grantees in drilling wells on the lands after the expiration of the grant and after notice not to drill such wells, cannot be recovered from the grantor.

A notice of the expiration of the grant and to keep off the premises, addressed to four grantees and served upon one of them, is sufficient. *Detlor vs. Holland*, Ohio, 49 N. E. R., 690; following *Baker vs. Kellogg*, 29 Ohio, 663.*

ASSUMPSIT.

Sec. 419. When It may be Employed.

Assumpsit cannot be maintained by one tenant in common against another for mere use and occupation of the common estate, each being entitled to the possession. Neither can it be maintained, where there are mutual accounts, growing out of the relation, as, for example, where one has been in the exclusive possession of the common estate, and by the expenditure of money and labor or care, has rendered the estate productive, in which case there is a liability to account under the Statute of 4 Anne, c. 16, Sec. 27, in force in Pennsylvania and there being items of discharge as well as charge, account render or bill in equity is the appropriate remedy. But where, there

* Upon the point of construction, this case follows *Dunham vs. Kirkpatrick*, 101 Pa., 36, in ruling that an instrument conveying "all the coal of every variety, and all the iron ore, fire clay and other valuable minerals in, on or under the following described premises," does not convey title to the petroleum and natural gas in such premises.

being no mutual accounts, one tenant in common has received more than his share, *assumpsit* will lie as for money had and received. So, also, where one tenant in common has expressly promised to pay his fellow either a sum certain or a *quantum valebat*, *assumpsit* is the appropriate remedy.

Norris vs. Gould, 15 W. N. C., 187 (1884), was in the Common Pleas of Philadelphia County, THAYER, P. J., delivering the opinion which was referred to in *Enterprise Gas Co. vs. Transit Co.*, *infra*, as "admirably clear and accurate." The issue was one of law upon demurrer to a bill in equity by one co-tenant against another for an account of mesne profits. The demurrer was sustained, the court adding, after a review of the authorities in point :

"It appears to us, therefore, that unless the plaintiff in this bill can show either an ouster by (the co-tenant) or an express promise to account with her, or to pay her something, she can maintain neither *trespass for mesne profits*, *assumpsit* nor *account render*, in order to compel him to pay her for *his mere occupation of the premises in question*. * * * If the plaintiff can maintain neither of these actions at law, we know of no rule which would enable her to sue the defendant in equity. In this case *aequitas sequitur legem*."

The following extract from the opinion of Mr. Justice MITCHELL, in *Enterprise Gas Co. vs. Transit Co.*, 172 Pa., 421 (1896), is the most recent statement of the doctrine in Pennsylvania, and should be read with care :

"The rights and remedies of tenants in common among themselves have been the subject of some discussion in this State. At common law, as each was entitled to the possession of the whole, there was no liability to account to each other, except upon an express agreement to act as bailiff, or an actual ouster which would sustain an ejectment for restoration of mesne profits. The act of 4 Anne, c. 16, Sec. 27, dispensed with the necessity of express appoint-

ment as 'bailiff,' and gave an action of account against a co-tenant, 'receiving more than comes to his just share or proportion,' and in this State it has been settled after some variance of opinion, that the action is not necessarily in account render, but where there has been an express promise, it may be in *assumpsit*. *Gillis vs. M'Kinney*, 6 W. & S., 78. In *Borrell's Admr. vs. Borrell*, 33 Pa., 492, the majority of the court sustained *assumpsit* on an implied obligation to account, but this case was practically overruled in *Kline vs. Jacobs*, 68 Pa., 57, where the subject was discussed by SHARSWOOD, J., and the rule clearly laid down that there is no implied obligation to account for mere use and occupation by one tenant in common, who has by his title a right of possession of the whole, although it is joint, and that *assumpsit* can only be maintained on an express promise to pay rent or to account. * * * But all of our cases, including even those which have most favored the action in *assumpsit*, such as *Borrell vs. Borrell*, *supra*, and *Luck vs. Luck*, 113 Pa., 256, have held that unless on an express promise of a liquidated sum, all the co-tenant is obliged to account for is a share of the profits."

Sec. 420. The Same.

A part owner of oil land cannot maintain an action of *assumpsit* against a pipe-line company to recover the value of oil delivered to the company by a person in possession of the land and holding adversely to the plaintiff. *Giffin vs. Pipe Lines*, 172 Pa., 580 (1896).

Sec. 421. *Assumpsit* the Proper Remedy for Breach of Contract under Seal Subsequently Altered by Parol.

When a parol agreement changing or adding to a previously executed sealed contract—in this case an oil lease—is subsequently made, the whole becomes parol, and the remedy is *assumpsit*, and not covenant. *Stoddard vs. Emery*, 128 Pa., 436 (1889); citing *Vicary vs. Moore*, 2 Watts, 451 (1834).

Sec. 422. Joinder of Lessee and Assignee as Co-defendants.

Where an oil lease contained a proviso that it should become void unless a well should be completed within one month from its date, or unless lessee should pay at the rate of \$100 monthly in advance for each additional month of delay in completion until completion, and lessor sued *in assumpsit* to recover three of such monthly payments, alleging non-completion of a single well, and joined the lessee and the latter's assignee as co-defendants, it was *held*, (1) that the contract upon which the suit was brought was not a joint contract; (2) that there was no amount for which defendants were jointly liable, and (3) that the contract contained no agreement, express or implied, on the part of the *lessee*, to pay anything to the lessor. *Glasgow vs. Griffith* (C. P. Butler Co.), 39 Pitts. L. J., 181 (1891).

TROVER.

Sec. 423. Requisites.

A special property and right of immediate possession is all that is necessary to maintain trover. *Gile vs. Weston*, 110 Pa., 312 (1885).

The mere right of property in a chattel is not sufficient to maintain trover. The plaintiff must also have the right of possession at the time of conversion. *WOODWARD, J.*, concurring opinion in *Kier vs. Peterson*, 41 Pa., 357.

In this case a lease was granted for the purpose of boring salt wells and manufacturing salt for a rent of every twelfth barrel manufactured. After a time

oil rose with the salt water, which was collected and sold. The owner of the land claimed the oil and brought trover, but it was *held* that trover would not lie, although the oil was his, for he had not the right of possession at the time of the conversion by the lessee. The proper remedy was a bill in equity for an account.

Sec. 424. The Same—Oil in Pipe Lines.

The true owner of land may not sustain trover for the value of the oil in a pipe-line produced and removed from the premises in the exercise of a colorable title, without fraud or force, by one in adverse possession.

The Pennsylvania Act of May 15, 1871, P. L., 268, authorizing replevin for chattels severed from the realty, though the title be in dispute, is limited to that form of action, and the only other proper remedy remaining to the owner is ejectment and proceedings for the mesne profits. *National Transit Co. vs. Weston*, 121 Pa., 485 (1888).

Sec. 425. The Same—Landlord and Tenant.

Trover will not lie against the owner of the freehold, who has taken possession of the premises, for fixtures attached by the tenant. An agreement between landlord and tenant that the latter may remove fixtures at the end of his term does not either permit him to do so *thereafter* nor maintain trover against the landlord. *Darrah vs. Baird*, 101 Pa., 265 (1882).

EJECTMENT.

Sec. 426.

The earlier cases observed carefully the difference between the two jurisdictions. In addition to *Coal Co. vs. Snowden, supra*, we may notice the following:

Norris' Appeal, 64 Pa., 275 (1870):

To give chancery jurisdiction as to a disputed boundary, some equity must be superinduced by the acts of the parties.

To the same effect, *Tilmes vs. Marsh*, 67 Pa., 507 (1871).

Long's Appeal, 92 Pa., 121 (1879):

A bill in equity prayed that the ownership, *possession*, care and control of leaseholds, the profits therefrom, and the products thereof, be decreed to plaintiff. * * * *Held*, that this was an ejectment bill and should be dismissed.

Messimer's Appeal, Id., 168:

Where a bill and answer in an equity suit simply present the ordinary case of property claimed by one party in possession of another, it is a mere ejectment bill, and there is nothing to give a court of equity jurisdiction.

Barclay's Appeal, 93 Pa., 50 (1880):

It is well settled in the equity practice of Pennsylvania, that a court cannot by bill bring before it parties having adverse claims to land and between whom there are no relations of trust or contract, and settle their several titles by decree.

Washburn's Appeal, 105 Pa., 480 (1884):

A court of equity has no jurisdiction to settle a disputed title to land, or to a right of way, on a bill in equity filed by the party in possession, averring that a multiplicity of suits at law may result to redress threatened trespasses.

Leininger's Appeal, 106 Pa., 398 (1884):

A court of equity will interfere to prevent entry on unimproved land or actual or threatened waste thereon, under a claim of right, only where it appears that the remedy by ejectment and estrepement is inadequate.

In this case, A claimed to be the owner in possession of a large tract of land. B entered on an unimproved part thereof, under claim of title, cut timber, sunk shafts and began the systematic mining of coal thereon. A filed a bill in equity, praying an injunction. *Held*, that in the absence of circumstances *showing imminent peril requiring a remedy speedier than any available at law*, a court of equity will not assume jurisdiction.

That is the exact point. There is no conflict in theory between the cases. In oil and gas operations, the peril is too imminent, and the nature of the minerals too fugacious, to permit delay.

INJUNCTION REFUSED.**Sec. 427. To Enforce Forfeiture for Condition Broken—
adequate Remedy at Law.**

In a lease of an ochre mine, the lessees covenanted to mine certain quantities of ore per annum, to pay certain royalties therefor, and that, "if any of the covenants above mentioned should not be complied with for the term of three months, then above lease to be null and void." *Held*, the lessees being still in possession after a failure to pay the royalties for the prescribed period, the lessor had an adequate remedy at law, *in assumpsit* for the arrears or in ejectment for

the land, and could not maintain a bill in equity to enforce a forfeiture of the lease. *Hoch vs. Bass*, 133 Pa., 328 (1890).

Sec. 428. Where Equity is Questionable and Injury Not Irreparable.

Where a deed conveyed a town lot, adjoining other lands of the grantor, with the *habendum*, "to have and to hold the said premises * * * without, however, the right to drill or mine for petroleum, etc., which right is not intended to be conveyed, but is forbidden to both parties hereto," on a bill filed by the grantor to restrain the grantee from drilling for oil on the lot conveyed, it appeared from the affidavits read that the grantor himself had put down one or more producing wells on property adjoining that which he had conveyed to defendant. It was *held* that the court below having found that plaintiff's equity was questionable, by reason of his own acts in drilling near the lot conveyed, and that the injury was not irreparable, an order refusing a preliminary injunction would not be reversed. *Acheson vs. Stevenson*, 130 Pa., 633 (1890).

INJUNCTION AWARDED.

Sec. 429. Operator Against Lessor.

A gas company which has leased and is using natural gas wells is entitled to an injunction against the lessor, restraining him from interfering, since such interference is liable to result in irreparable injury. *Citizens Nat. Gas Co. vs. Shenango N. G. Co.*, C. P. Beaver Co., Pa., 20 Pitts. L. J., 131 (1890); *Same vs. Same*, 138 Pa., 22 (1890).

Sec. 430. Against Lessor from Drilling upon Leasehold with Underlying Gas.

When lessee is in possession of gas underlying the premises, equity has jurisdiction to restrain the lessor from drilling on the leasehold, the rights granted to the lessee being necessarily exclusive, and the damage to arise from threatened waste being entirely incapable of measurement at law, even if not irreparable.

MITCHELL, J.:

“It is superfluous to cite authorities for so familiar a principle, but I may refer to *Allison's Appeal*, 77 Pa., 221 (*supra*), as a recent case in this court, where the invasion restrained was of complainant's right to oil, a fluid far more capable of accurate measurement than gas.” *Westmoreland, etc., Gas Co. vs. De Witt*, 130 Pa., 235 (1889).

Sec. 431. In a Contest Over an Incorporeal Hereditament.

Equity has jurisdiction to award an injunction in a contest over the right to operate land for oil, where the lease under which the right is claimed does not grant a fee, but merely an incorporeal hereditament. *Nat. Gas Co. vs. Phila. Co.*, 158 Pa., 317 (1893).

Sec. 432 Against Re-entry of Lessor when Claim of Forfeiture is Disputed.

A preliminary injunction will be awarded and continued against a lessor in an oil and gas lease who has re-entered upon the demised premises, where it appears that the re-entry was made in the assertion of a disputed claim that the lessee had forfeited his rights

under the lease, and the lessor's right is disputed on every ground on which he puts it. *Poterie vs. Poterie Gas Co.*, 153 Pa., 10 (1893).

Sec. 433. But Not Against Lessee in Possession and Developing the Territory.

Same vs. Same, Id., p. 13.

Sec. 434. Re-instatement of Lessee after Dispossession.

The end of this somewhat protracted litigation was reached in a case between the same parties reported in 179 Pa., 68 (1897). It was there adjudged that on a bill in equity by a lessee, under an oil and gas lease to restrain lessor from interfering with the lease, it appeared that the lessor had forcibly taken possession of the premises, severed the pipes and diverted the gas, alleging as a reason therefor that the lease was forfeited. By injunction the lessee was reinstated. The master found that there had been no default by the lessee, and recommended that lessor be ordered to pay lessee a specified sum as compensation for gas diverted during the time lessor was in possession. The decree thus recommended was entered without prejudice to the right of the lessor to compel the lessee to account for his share of the earnings. *Held*, that the decree was without error.

Sec. 435. Preliminary Injunction—Scope Should not be Too Broad.

Equity has jurisdiction by injunction to prevent irreparable injury to land, even though there is a controversy as to title between the parties, and, having taken jurisdiction on that ground, will administer

complete relief, though in so doing it be necessary to decide between two adverse titles.

The unlawful extraction of petroleum or gas from land, they being part of the land, is an act of irreparable injury which equity will enjoin.

A preliminary injunction must not do what can only be done after full hearing by final decree, as by changing the possession of realty, or depriving one in possession of its benefits in any other respect than as to the wrongful act proper to be enjoined, the proper purpose of such injunction being to preserve the present *status* until a full hearing upon the merits shall be had. An injunction as to so much of it as is thus excessive is void, and will be modified upon motion. *Bettman vs. Harness*, 42 W. Va., 433 (1896); S. C., 36 L. R. A., 566.*

Sec. 436. Injunction Against Threatened Drilling by a Stranger.

In *Indianapolis Nat. Gas Co. vs. Kibbey*, 135 Ind., 357 (1893), an injunction was awarded where C, a stranger to a contract between A and B, touching a grant of land for the boring of a gas well, had erected a derrick on the track and was threatening to bore a gas well.

HOWARD, J.:

"An action for damages would have been inadequate, since the damages could not be measured. * * * How much the flow of appellant's well would have been diminished could not be determined; the damages could not be measured in money."

*This is an important case from other points of view, and the opinion will repay examination upon the subjects of construction of leases and *estoppel in pais*.

Sec. 437. Against Collection of Illegal Tax.

A court of equity will restrain by injunction the collection of a tax assessed upon the real estate of a natural gas company, organized under the Pennsylvania Act of 1885, where the evidence shows that the land is part of its capital stock and is necessary and indispensable to the company in carrying out the public purpose for which it was incorporated.

Equity will restrain the collection of a tax where there is a want of power to tax or a disregard of the Constitution in the mode of assessment. *Gas Co. vs. Elk County*, 168 Pa., 401 (1895).

In *Banger's Appeal*, 109 Pa., 91 (1885), the same court said :

“ It was urged that a court of equity will not interfere to restrain the collection of taxes, but will leave the party aggrieved to his remedy at law. This is true where the tax is lawfully assessed, or where the matters complained of are mere irregularities in the valuation or assessment, but where there is either a want of power to tax or a disregard of the Constitution in the mode of assessment we have no doubt of the power and the duty of a court of equity to interfere.”

Sec. 438. Against Pipe-Line where Injury May Result to Owner of Coal *in situ*.

An owner of coal *in situ*, to whom the surface owner has granted the right to remove the whole of it, without liability for any resulting subsidence of the surface, is entitled to an injunction restraining a corporation from entering upon the overlying surface to construct a pipe-line until payment made or security given for compensation for the easement of support, acquired as a matter of law by such entry. *Penn Gas Coal Co. vs. Versailles Fuel Gas Co.*, 131 Pa., 522 (1890).

Sec. 439. Against the Use of Explosives in Sinking Natural Gas Wells.

If parties sink a gas well in the centre of a thickly populated city, where they cannot collect the necessary quantity of nitro-glycerine to "shoot" it without endangering the property and lives of those who have no connection with their operations, they must be content with such flow of gas as can be obtained without such shooting, and an injunction will lie against them to prevent the accumulation or use of that explosive. *People's Gas Co. vs. Tyner*, 131 Ind., 277 (1891).

Sec. 440. Against Trespass.

In a suit to enjoin a trespass on mining lands and the taking of ores therefrom, the object being merely to preserve the rights of the parties until an action at law can be brought to determine the title, the failure of the bill to set out complainant's chain of title is not fatal; and where an answer is filed without interposing a demurrer, the sufficiency of the bill in this respect is a question for the trial court to deal with in its discretion.

In such a case, a bill which describes by metes and bounds the land claimed by complainant, avers that he had possession thereof at the time of the alleged trespass, and that he owns the same in fee under the laws of the State, may be regarded, after answer filed, as sufficient, without a particular statement as to how he acquired title.

Upon a bill filed to enjoin a trespass and the taking out of ores, where the affidavits strongly tend to show that the complainant had undisputed pos-

session of the ground until driven off by violence and threats of bloodshed, constituting the trespass complained of which is enjoined, the defendant in the injunction suit may properly be required by the decree to become plaintiff in a suit at law to determine the title. *Thomas vs. Marble & Talc Co.*, U. S. C. Ct. Ap., 4th Cir., 58 Fed. Rep., 485 (1893).

Sec. 441. Federal and State Practice.

The equity jurisdiction of the Federal courts cannot be controlled by modifications of the general practice which have grown up in the various States, even in respect to land titles; but such jurisdiction remains as established by the general principles of equity jurisprudence. *Ibid.*

Sec. 442. Against Cutting off a Supply of Natural Gas.

When a natural gas company, in consideration of privileges granted, agreed to furnish gas to the public buildings and churches of the borough free of cost, and it was provided that if similar privileges be granted another company, the burden should be decreased *pro rata* according to the number of franchises granted; and subsequently, similar privileges were granted another company, and defendant agreed to furnish the school-house and one church with gas, if the second company would furnish the other public buildings and churches, it was *held*, on a bill in equity to enjoin defendant from cutting off the supply of gas from the school-house, that the contract was valid and would be enforced in equity. *Sewickley, etc., School District vs. Ohio Valley Gas Co.*, 154 Pa., 539 (1893).

Sec. 443. Against the Violation of a Restrictive Covenant, and Rendering the Neighborhood Less Desirable for Residences.

In *Acheson vs. Stevenson*, 146 Pa., 228 (1892), the court awarded an injunction restraining the defendant from operations for oil on the lot conveyed, in violation of the restrictive covenant, and rendering the neighborhood less desirable for residences; but refused an account for damages for oil obtained by defendant.

MANDATORY INJUNCTIONS.

Sec. 444. Refused Upon Exhaustion of Fuel Supply.

A bill was filed by plaintiff, alleging that its works had been constructed for the use of natural gas alone as fuel; that it had made a contract with the defendant, a natural gas company, according to which defendant was to furnish gas to plaintiff for fuel for three years, if its wells were reasonably capable thereof; that the gas company had turned off the supply of gas; that plaintiff's works had been built in contemplation of the use of gas as a fuel and nothing else, and that unless the supply were continued irreparable injury would ensue. *Thompson vs. Fuel Gas Co.*, 137 Pa., 317 (1890).

This would seem to present as strong a case for equitable interference as any of the later cases quoted above. No opinion was delivered by the Supreme Court, in accordance with its rule to that effect in appeals from an order of the court below denying a preliminary injunction. Counsel for the gas company seem to have rested their argument on the ground

that the decree prayed for was not preventive, but mandatory, and therefore properly refused.

And upon a generally similar statement of facts, the defendant, however, averring a decrease in the supply of gas at its wells and a waste and misuse of gas by the plaintiff, the same ruling was made in *Black Lick Co. vs. Saltsburg Gas Co.*, 139 Pa., 448 (1891). The court below dissolved the injunction and mandatory order, without prejudice to the right to renew the motion should proper cause arise. This action was affirmed. In the course of the opinion the lower court said, per WHITE, P. 7.:

“The power to make a mandatory order in an application for a preliminary injunction, so as to restore the *status quo* to the condition existing prior to the wrongful act and preserve it until a final hearing, is sanctioned by authority in this State. The reasoning of Justice SHARSWOOD in *Audenried vs. R. R. Co.*, 68 Pa., 375 (1871), does not imply that it has not been and cannot be done, but utters proper admonitions about the great care with which it should be done. The very recent case of *Cooke vs. Boynton*, 135 Pa., 110 (1890), is an authority showing that it can be done. The court below there decided that ‘no mandatory injunction can issue except upon final hearing.’ The present Chief Justice (PAXSON) ruled just to the contrary. So the power to issue such an order is now *res judicata*.”

The law had been laid down very distinctly by Judge SHARSWOOD in *Audenried vs. R. R. Co.*, *supra*, with abundant citations. Among other things, he said:

“All injunctions are processes of mere restraint; yet, final injunctions may certainly go beyond this and command acts to be done or undone. Then they are termed mandatory. They are often necessary to do complete justice. But the authorities, both in England and this country, are very clear that an interlocutory or preliminary injunction cannot be mandatory. In *Gale vs. Abbott*, 8 Jurist, N. S., 987, Vice-Chancellor Kindersley said: ‘It was

useless to come for what was called a mandatory injunction on an interlocutory application. Such an application was one of the rarest cases that occurred, for the court would not compel a man to do so serious a thing as to undo what he had done, except at the hearing."

A direct conflict with the *Audenried Case* is avoided in the following passage from the opinion in *Cooke vs. Boynton* :

"What we did in the *Easton Case* (133 Pa., 505), we will do here. We will restore the injunction, without passing upon the merits of the case. They will be considered when it comes here upon final hearing. *As far as it is possible* upon a preliminary injunction, we will restore the *status quo* as it existed prior to the acts of the defendants. While the injunction will not require the defendants to relay the tramway, it will enable the plaintiff to do so, and will protect him in its use pending this litigation."

Sec. 445. The Restoration and Preservation of the *Status Quo*.

Whiteman vs. Fuel Gas Co., 139 Pa., 492 (1891), resembled *Thompson Gas Co.*, *supra*, in practically every point save the language of the contract, which provided that the gas company should supply fuel gas to the plaintiff "for all purposes connected with the manufacture of the wares aforesaid * * * so long as natural gas may continue to be produced from the territory now or hereafter owned or operated by" the gas company. On a bill averring that, relying on the contract, the plaintiff's works had been constructed for the use of natural gas only as fuel, and that the company had shut off the entire supply while the works were in operation, endangering loss incapable of accurate adjustment, it was error to refuse a preliminary injunction to the extent of restoring the *status quo*.

The Supreme Court said: "It is proper to observe that such injunction is *only mandatory to the extent of restoring the status quo* as it existed on the 25th of October last, three days before the filing of this bill."

Sec. 446. The Same.

An important decision upon this point is that of *Buskirk vs. King*, U. S. C. Ct. Ap., 4th Cir., 72 Fed. R., 22 (1896), where the application was for an injunction restraining the cutting of timber, pending an action of ejectment. The injunction was awarded, the court holding that complainant was not required to make out such a case as would entitle him to decree upon final hearing, and that an injunction might be properly awarded although the ultimate relief sought is finally denied.

Per Goff, Cir. J.:

"We must keep in mind that courts of equity are not to be regarded as in any manner forestalling the final action of courts of law on the questions involved when they grant the temporary relief afforded by interlocutory injunctions. In doing so, they simply adjudge that the plaintiff presents such a case as justifies the court in preserving the *status quo* until a court of law has had an opportunity, with all the facts before it and with the assistance of a jury, of determining the real merits of the controversy. * * * The legal rights of the parties are not decided by the courts of equity, but the property in issue is guarded until those rights have been ascertained by the tribunal established for that purpose. * * * Like bills of *quia timet*, injunctions in such cases are in the nature of writs of prevention, intended to accomplish the ends of precautionary justice. While it is true that under the ancient rules of courts of equity, parties were left to their remedies in cases of trespass, it is equally true that at this time the practice prevails of allowing injunctions in such cases where the injury is irreparable.

* * * This practice is now well-established in the courts of the United States, as also in those of a number of the States." Citing *U. S. vs. Gear*, 3 How., 120 (1844); *Erhardt vs. Boaro*, 113 U. S. R., 537 (1884), and other cases.

In *Oolagah Coal Co. vs. M' Caleb*, 68 Fed. R., 87 (1895), it was *held* that equity had jurisdiction to determine defendant's claim of title, whether the same was founded in mistake or fraud. See, also, *M. & M. Co. vs. Mining Co.*, 58 Fed. R., 129 (1893); *Lumber Co. vs. James*, 50 Fed. R., 360 (1892).

Sec. 447. Mandatory Injunction to Compel the Laying of Pipe-Line Under the Surface.

Where a land-holder granted a gas company the right of way through his land, and by a supplemental agreement granted a greater width for the right of way, the gas company agreeing to lay its pipes two feet beneath the surface of the ground, on a bill filed by the land-owner to compel the company to place its pipes (which for 275 feet had been laid on the surface) two feet under ground, *held*, that the stipulation as to placing the pipes under ground was not an independent collateral agreement, and that an injunction should be granted. Defendant could not be heard to allege the inconvenience to the public which would be caused by stopping the flow of gas to make the change because of its wrongful act in laying the pipes on the surface. *Carothers vs. Phila. Co., C. P. Ally. Co.*, 23 Pitts. L. J., 191 (1892).

Sec. 448. Receivers.

The appointment of a receiver is the exercise of a power in aid of a proceeding in equity, and is the subject of sound discretion. The court must be convinced

that it is needful, and is the appropriate means of securing a proper end. Such an appointment is a strong measure, and not to be exercised doubtingly. Where a party is clothed with title and possession such as are conferred by a lease in writing, and is in the enjoyment of rights apparently legal, a receiver will not be appointed unless under urgent and peculiar circumstances. The plaintiff must show a clear right in such a case, or a *prima facie* right with such attending circumstances of danger or probable loss as will move the conscience of a chancellor to interfere. *C. & A. O. M. Co. vs. U. S. Pet. Co.*, 57 Pa., 91 (1868).

A mine should not be taken from one claiming to be the owner and placed in the hands of a receiver, if a good bond conditioned to account for and pay over the proceeds as the court might thereafter direct would furnish security. *Stith vs. Jones*, 101 N. Car., 360.

The appointment of receivers is a severe measure not to be adopted except in an urgent and strong case. *Beverly vs. Brooke*, 4 Gratt. (Va.), 209; *Boyce vs. Montauk Coal Co.*, 37 W. Va., 73.

In *Thomas vs. Marble & Talc Co.*, 58 Fed. R., 485, *supra*, it was *held* that where the ground in dispute is a narrow strip, adjoining which both parties have undisputed possession of other lands, which they can continue to work, the case is not one for a receiver, but for an injunction to maintain the *status quo* until the title can be determined by an action at law.

The stationary nature of the minerals involved in the controversy doubtless led to this ruling. Had minerals of the fugacious nature of oil and gas been the subjects of the suit, it cannot be doubted that the

same court would have promptly appointed a receiver, not only to take possession of the production from opened wells, but, if necessary to preserve the lands from exhaustion, to drill new ones.

Sec. 449. The Right of Way.

The facts in *Cooke vs. Boynton* lead naturally to the consideration of a most important decision therein referred to upon the use of equitable remedies in the suppression of a threatened flagrant invasion of private rights, that of *Easton Passenger Ry. Co. vs. Easton*, 133 Pa., 505 (1890). It will be read with interest by all who are familiar with certain of the modern methods of the exercise of the right of eminent domain, though in this case the party who is usually the aggressor happened to be the victim. It is given here because substantially similar facts have attended the controversies of rival pipe-lines and of pipe-lines with property-owners.

The ruling was as follows: A railway track laid upon a city street in good faith under a corporate charter granted for the purpose, but not endangering the health or safety of the inhabitants, cannot be classed among the nuisances which the city authorities may abate summarily without resort to the processes of the law, even though, by reason of the manner of its construction, it may obstruct the street to such a degree as to be a nuisance.

When the authorities of a city have declared such a track in violation of a municipal ordinance and a public nuisance, and have summarily undertaken to remove it by force, and the railway company prays for an injunction against such removal, the city not applying by cross-bill or otherwise for a legal adjustment of

the differences between the company and itself, the injunction will be granted without regard to the merits of the controversy.

Per PAXSON, C. J.

"If in point of fact the track was not a common nuisance they (the city authorities) had no right to tear it up; they were merely trespassers and rioters and liable civilly and criminally as such. We are emphatic upon this point, because we do not wish to be misunderstood. There is a growing disposition in this commonwealth, especially on the part of corporations, private as well as municipal, to take the law into their own hands and settle controversies by force, instead of appealing to the courts to redress their wrongs and enforce their rights in an orderly and peaceable manner. Instances are not rare, and are of recent occurrence, where bands of men have stood confronting each other, some of them with arms in their hands, in the assertion of supposed rights. The public peace has been threatened in this manner, sometimes resulting in a loss of life. It is well that it should be known that such persons, whether representing individuals, private corporations or municipalities, are simply rioters and answerable to the criminal law for their misconduct."

This was followed by *Raynoldsville, etc., R. R. Co. vs. Buffalo R. R. Co.*, 134 Pa., 541 (1890), where substantial equitable relief by injunction was granted in a dispute between plaintiff and defendant as to a grade crossing.

While we have mentioned the case of *Cooke vs. Boynton*, the facts have not been given. They were briefly incident to a disputed claim of forfeiture between lessor and lessee; the lessor entered, tore up by force a tramway laid under the lease, and placed a building upon ground which lessee had occupied. It was *held* that equity would restrain the continuance of the interference without regard to the merits of the controversy.

Speaking of the *Easton Case*, the same learned judge said :

“ What the city did in that case, the defendants did in this ; they decided in their own favor all the questions of law and fact arising under the lease, and enforced their decision by tearing up the tramway—not only once, but thrice, the last destruction being so well timed as to escape by a few minutes the injunction issued by the court. If such matters are to be settled in this way ; if we sanction the doctrine that might makes right, there will be but little use for the civil courts, while the criminal side of the courts will have a large accession of business, in the matter of riots, assaults and homicides growing out of such transactions.”

CHAPTER XVIII.

NEGLIGENCE.*

Sec. 450. Definition.

Negligence is the absence of proper care, caution and diligence ; of such care, caution and diligence as, under the circumstances, reasonable and ordinary prudence would require to be exercised. It may consist as well in not doing the thing which ought to be done, as in doing that which ought not to be done, when in either case it has caused loss or damage to another. MERCUR, J., in *Fritsch vs. Allegheny*, 91 Pa., 226 (179).

Sec. 451. General Doctrine.

A petroleum pipe-line or natural gas company which has its pipes or mains laid along a public high-

* The treatment of this subject, in accordance with the plan previously outlined, will be confined to cases of negligence growing out of the use or abuse of petroleum and natural gas. It would be easy to expand it so as to include the subject of illuminating gas, the decisions relating to which are numerous and always in point, if not controlling. But for them resort must be had, save in the few instances specifically mentioned, to the standard treatises on Negligence and to a full and instructive note appended to the report of the case of *Ohio Gas Fuel Co. vs. Andrews*, 29 L. R. A., 337. Attention may be directed here only to the application of familiar doctrines, such as proximate cause, contributory negligence, fellow servants, duty of employer and the like, to facts and circumstances arising from the use of the substances mentioned.

way owes a duty to the public to use reasonable and ordinary care in so planting its pipes as to prevent damage by the pipes themselves or the escape of their contents in such quantities as to become dangerous to life or property.

A natural gas company is not an insurer, but it is liable for an explosion where it knew, or by the exercise of ordinary care could have known, of the existence of a defect in its pipes or mains. It is liable for damages caused by defective pipes, flues, etc., after such actual or implied notice of their condition. Such notice or knowledge will be *assumed* where the circumstances are such that the owners by the exercise of proper and reasonable diligence might have known of the defect.

Such an inspection of the line must be maintained as will insure reasonable promptness in the detection of all leaks that may occur from the deterioration of the material of the pipes, or from any other cause within the circumspection of men of ordinary skill in the business. Where there is a statutory requirement for pipes of sufficient strength to withstand a certain pressure, a failure so to test them is negligence.

Sec. 452. General Duty of One Collecting an Element Liable to Escape.

As pertinent to the subject of the measure of care required of one who stores, uses or supplies a dangerous substance, a recent decision of the Supreme Court of Ohio will be read with interest. While it concerns water as the damage-producing element, it would seem to apply equally to natural gas or any other mineral *feræ naturæ*.

The case is that of *Defiance Water Co. vs. Olinger*, 54 Ohio, 532 (1896), and the ruling is to the effect that one who collects on his own premises a substance liable to escape, and, if it should escape, liable to cause mischief, must at least use reasonable care to restrain it. If, for want of such care, it escapes and injures persons or property rightfully on adjoining premises, he is answerable for the damages occasioned on account thereof.

The facts are briefly that defendants had erected *on its own premises* a large iron tank or stand-pipe, which it maintained full of water for the purpose of supplying its customers in a neighboring city. The stand-pipe had been negligently constructed, and, prior to the accident, had become cracked and weakened to the knowledge of the defendant company, and by reason of this negligent construction and an accumulation of ice, sand, etc., the stand-pipe fell and the escaping water overwhelmed the plaintiff, causing the injuries to her person complained of.

BRADBURY, J.:

“ This brings us to the consideration of the question of the liability of one who, for his own purposes, collects upon his premises a substance likely to injure others in case it escapes.

“ The principle upon which liability rests in such case is quite unlike that which determines the liability of one who leaves unguarded, excavations upon his own lands, or one who negligently constructs a building so that it falls upon his own premises. In these latter cases no one can be injured unless he comes upon the premises. If he remains away, he is safe. In the former, the danger arises from the natural tendency of the things to escape from the premises where stored, together with the likelihood of its doing injury if it does escape therefrom. In England it seems to be settled by *Fletcher vs. Rylands*, 1 Law Rep. Excheq., that the duty rests upon one who collects and stores upon his premises inanimate

substances or animate things from the escape of which injury is likely to follow, to prevent such escape. While this duty may not extend to trespassers, or those who, for their own purposes, without express or implied invitation from the proprietor, choose to come upon the premises, yet that case (*Fletcher vs. Rylands, supra*), should be regarded as extending this duty to all persons who may be rightfully on adjoining premises. BLACKBURN, J., in the course of an able opinion, and speaking for the whole court, used the following language: 'We think the true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage that is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to plaintiff's default; or, perhaps, that the escape was the consequence of a *vis major*, or the act of God. * * * The general rule as above stated seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own, and it seems but reasonable and just that the neighbor who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there, no mischief may accrue, and it seems but just that he should, at his peril, keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this, we think, is established to be the law, whether the things so brought, be beasts, or water, or filth, or stench.'

"This doctrine," resumes the Ohio court, "would seem to be in exact accord with justice and sound reason; but in the case before us we are not required to apply it to its full extent, because the defendant in error, in her amended petition, expressly avers negligence in the construction of the stand-pipe, as well as a knowl-

edge that it had afterward cracked and become weakened, a negligent failure to make repairs, and that the accident which caused her injuries was the direct result of such negligence.

"Therefore, whether or not she could recover in the absence of negligence on the part of the water company in storing the water, does not concern us at this time, for, however that may be, certainly one who, like defendant in error, is rightfully on premises adjoining those upon which such substances are stored, and is injured by their escape, should, upon the plainest principles of natural justice, recover from the proprietor storing the same, damages for such injury, where the escape was caused by negligence." Cf. *Woolen Mfg. Co. vs. Glycerine Co.* 14 Ohio C. C. R., 522 (1897).

"While every person has exclusive dominion over his own property, and may subject it to such uses as may subserve his wishes and private interests, he is bound to have respect and regard for his neighbor's rights.

"The maxim '*sic utere tuo ut alienum non laedas*' limits his powers. He must make a reasonable use of his property, and a reasonable use can never be construed to include those uses which produce destructive vapors and noxious smells, and that result in material injury to the property and to the comfort of the existence of those who dwell in the neighborhood.

"The reports are filled with cases where this doctrine has been applied, and it may be confidently asserted that *no authority can be produced holding that negligence is essential to establish a cause of action for injuries of such a character.*" *Bohan vs. Gas Light Co.*, 122 N. Y., 18. See, also, *Brady vs. Detroit Steel, etc., Co.*, 102 Mich., 277 (1894); S. C., 26 L. R. A., 175.

Sec. 453. The Degree of Care.

From several standpoints, *Koelsch vs. Philadelphia Co.*, 152 Pa., 535 (1893), is the most important of the Pennsylvania cases upon the subject of liability for explosions of natural gas. Plaintiff's house was supplied by defendant with natural gas for fuel through a service pipe connected with a main pipe in the

adjacent street. It was wrecked and the plaintiff and several members of his family injured by an explosion of the gas which had accumulated in his cellar. Plaintiff alleged negligence in defendant in permitting the gas to escape through a leak in its main pipe and find its way to his cellar through the loose earth and broken rock of which the street at that point was formed. Defendant denied this, and alleged that the leak was in plaintiff's own pipe, for the existence of which he alone was responsible. There was a verdict and judgment for plaintiff, which on appeal was affirmed.

Per HEYDRICK, J.:

"The definitions of negligence which have been attempted imply that a higher degree of care and vigilance is required in dealing with a dangerous agency than in the ordinary affairs of life or business, which involve little or no risk of injury to persons or property. *While no absolute standard of duty in dealing with such agencies can be prescribed*, it is safe to say, in general terms, that *every reasonable precaution suggested by the experience and the known dangers of the subject ought to be taken*. This would require, in the case of a gas company, not only that its pipes and fittings should be of such material and workmanship, and laid in the ground with such skill and care, as to provide against the escape of gas therefrom when new, but that such system of inspection should be maintained as would insure reasonable promptness in the detection of all leaks that might occur from the deterioration of the material of the pipes, or from any other cause within the circumspection of men of ordinary skill in the business. Something like this was said in *Kiebele vs. Philadelphia*, 105 Pa., 41; and in *Holly vs. Boston Gas Light Company*, 8 Gray, 123; and *Smith vs. The Boston Gas Light Company*, 129 Mass., 318; and the principle is recognized in many kindred cases. It requires nothing unreasonable; *it does not require* that the company shall keep up a constant inspection all along its lines without reference to the existence or non-existence of probable cause for the occurrence of leaks or escape of gas."

It was *held* further that, if an injury to a gas main be a natural and probable consequence of the construction of a sewer, by reason of the settling of the ground in close proximity to the gas main, and the gas company had, or ought to have had, knowledge of the construction of the sewer, it was its duty to efficiently guard against the damage likely to result, and the responsibility cannot be shifted on the municipality or its contractor. The question of notice or knowledge was for the jury.

Sec. 454. Indiana.

The general doctrine is affirmed in Indiana in the case of *Consumers' Gas Trust Co. vs. Perrego*, 144 Ind., 350 (1895), where it was *held* that the destruction of a building by the explosion of natural gas escaping from a leak in a high pressure main eighty or ninety feet distant across the street and reaching the building by penetrating the soil under its frozen surface, renders the gas company liable, where it had made no effort to prevent the leak, although this had continued for several years and notice of the fact had been given to line-walkers.

In *Gas Trust vs. Corbaley*, 14 Ind. App., 549 (1895), a purchaser of a natural gas pipe-line, for defects in the original construction of which it is not liable, was *held* liable for damages occasioned by the explosion of escaping gas where it knew, or by the exercise of *ordinary care* could have known, of the existence of the leak at the point where the gas which exploded escaped long before the accident.

See, also, *Mississinnewa Mining Co. vs. Patton*, 129 Ind., 472 (1891); S. C., 27 Am. St. R., 203; *Alex. M. & E. Co. vs. Irish*, 16 Ind. App., 534 (1896).

Sec. 455. Transportation of Oil by Common Carrier.

It is the duty of a common carrier to provide a vehicle adapted in all respects to the purpose of carriage, and so constructed as to encounter the ordinary risks of transfer, and if the vehicle be not of such character, the carrier becomes responsible for any loss consequent on such defect or any to which it may have contributed.

When any merchandise is on the same train with cars loaded with combustible substance, easily ignited by sparks, it is the special duty of the carrier to take every available precaution against the spreading and communication of fire, should it occur. When the carriage is defective, the *onus* is on the carrier to disprove negligence. *Empire Transp. Co. vs. Wamsutta Oil R. & M. Co.*, 63 Pa., 14 (1870).

The facts in this case were interesting. The plaintiffs had shipped refined oil in defendant's cars, a car of crude oil being loaded for another person at the same time. It was shown at the trial that standard oil will not ignite by flame at lower than 110 degrees, and that crude oil will ignite at 65 degrees and below. In the course of the shipment, fire was discovered in the front car next to the engine. All the other cars, except the second, were at once detached by a rear engine. The second could not be separated, the coupling-pin being fast, and nearly three thousand gallons of oil were destroyed. The origin of the fire was doubtful, though probably from sparks from the engine. The engine was in good condition, with a new spark arrester.

The defendant gave in evidence its receipt to plaintiffs for the oil, subject to certain conditions, the third of which was that "the owner or consignee, in

consideration of the extremely hazardous nature of such merchandise, which is not covered by any extra charge for transportation, hereby assumes all risk for leakage, evaporation and loss by fire, while in transit or at depots, etc., from any cause whatever"—the bill of lading to be taken as a receipt in full for any claim against the company.

A point of plaintiff company, embodying the doctrine as stated above, was affirmed, *SHARSWOOD, J.*, delivering the opinion of the court :

"As a common carrier cannot, by a special notice or limitation in the contract or bill of lading, protect himself from liability for the negligence of himself or his servants, *P. R. R. Co. vs. Henderson*, 1 P. F. Smith, 315, the only question in this cause was whether the defendant had been guilty of such negligence. The error assigned is that the court took that question from the jury, by affirming the plaintiff's second point, by which they were instructed that, if they were satisfied that certain facts were proved, the plaintiffs were entitled to recover. The rule upon this subject was very clearly laid down in *M' Cully vs. Clarke*, 4 Wright, 399, in which it was said : 'There are some cases in which a court can determine that omissions constitute negligence. There are those in which the precise measure of duty is determinate, the same under all circumstances. *When a duty is defined, a failure to perform it is, of course, negligence.*' Other cases fully corroborate this doctrine : *Powell vs. P. R. R. Co.*, 8 Casey, 414 ; *P. R. R. Co. vs. Ozier*, 11 *Id.*, 60 ; *R. R. Co. vs. M' Clurg*, 6 P. F. Smith, 294 ; *Glassey vs. Ry. Co.*, 7 *Id.*, 172."

Sec. 456. The Same—Proximate Cause—Province of Court and Jury.

Hoag vs. R. R. Co., 85 Pa., 293 (1877), is a leading case in point. The facts were not unlike those in the case last cited.

Plaintiffs owned an oil lease in Oil City, near the track of defendant. The railroad of defendant ran

along the right bank of Oil Creek, at the base of a high and precipitous hill. During a rainstorm a slide of earth and rocks came down the side of the hill and lodged on defendant's track. A short time after this slide fell, a train, consisting of seventeen cars of crude petroleum, ran into the slide. The train was thrown from the track, and, the oil cars bursting, the petroleum was ignited by fire from the engine. The oil thus ignited ran into the creek and was carried down the stream some three or four hundred feet and set fire to the buildings of the plaintiffs, which were totally destroyed. The creek at the time was quite high, and reached the buildings of the plaintiffs, so that the burning oil, as it was carried down the stream, came directly in contact with them. From the point where the slide fell, the track of the railroad is in view for several hundred feet; but it was in evidence that, owing to the wet condition of the track, the engine could not have been stopped within that distance.

The trial court, TRUNKEY, J., charged :

"To hold the defendant answerable for this loss would be on the same principle that the defendant would be answerable for all losses occasioned to other persons by reason of the burning oil floating down the current. If that burning oil, thus carried, directly fired bridges, wharves, warehouses and other property, over and along the stream for a great distance, every owner could recover his loss from the defendant, if it is liable to the plaintiffs. If the current of water is not an intervening agency, the cause is proximate; if it is, the cause is remote. The result depends not on time or distance, but on the presence or absence of an intervening agency. Whether the fire be carried by running water over which the defendant has no control, or through its own woodshed, or through the warehouse of another, can make no difference, unless it be held that water is not an intervening agency in carrying and communicating the fire."

This ruling was declared to have been made upon sound principles and was affirmed, the court ruling that where an injury is alleged to have arisen from negligence, the question of the proximate cause is to be decided by the jury upon all the facts of the case; but where the facts are undisputed and *the intervening agency manifest*, it is not error for the court to withhold the evidence from the jury. Following *P. R. R. Co. vs. Kerr*, 62 Pa. (1870); distinguishing *P. R. R. Co. vs. Hope*, 80 Pa., 373 (1876), and *Raydure vs. Knight*, 2 Weekly Notes Cases, 713. See, also, *Kuhn vs. Jewett*, 5 Stewart (N. J.), 647.

Sec. 457. The Same.

A similar ruling upon a generally similar state of facts was made in *Behling vs. S. W. Pa. Pipe-Lines*, 160 Pa., 359 (1894). Burning oil from a neighboring property flowed down upon defendant company's pipe-line, causing it to burst and throw a spray of burning oil on plaintiff's house, causing its destruction. *Held*, that in such case the pipe-line is not the proximate cause of the injury. The *causa causans*, the true proximate cause of the burning of the house, was the descending flood of fire. The bursting of the pipe-line was not such an element of danger as the company was bound to foresee and provide against. In such a case, the facts being undisputed, the question of proximate cause is for the court.

Sec. 458. The Same—Reasonable Probability—Degree of Contributory Negligence.

Gas Co. vs. Robinson, 99 Pa., 1 (1881) is another of the leading cases upon this subject.

A municipality in constructing a sewer in one of its streets broke the pipe of a gas company, laid some three or four feet distant, from which gas had leaked both prior to and during the construction of the sewer. Complaint had been made, but the leak had not been stopped. The city engineer in charge of the construction of the sewer, knowing of the leakage, entered with a light, and was seriously injured by an explosion. In an action by him against the company, it was *held* that its negligence in failing to repair the leaks was the proximate and not the remote cause of the accident, and that the fact that the city contractor in building the sewer, had disturbed and broken the pipe, had no effect to shift the cause.

Per GORDON, J.:

"It is said the company is not liable for this accident because the penetration of gas into the sewer was not a reasonable probability. But, to meet the defendant on its own grounds, what is there unreasonable about the probability of gas being forced from a broken pipe through three or four feet of loose earth into an adjacent sewer? Gas permeates iron, and why not earth and brick? The company was responsible for what might, in the nature of things, occur from its neglect, and its responsibility was not limited by what its officers may have thought to be improbable or even impossible."

A judgment for plaintiff was, however, reversed upon the ground of contributory negligence, the court ruling that as *any* degree of negligence on the part of plaintiff, contributing to the injury, will destroy his right to recover in such an action, it is error to charge the jury only as to his essential or material negligence.

To the same effect, *Oil City Fuel Supply Co. vs. Boundy*, 122 Pa., 449 (1888), where it was further

held that it is not error to charge that plaintiff, in using natural gas from defendant's high pressure line, assumed only the usual and ordinary risks—not those which became extraordinary through the negligence of defendant.

Sec. 459. Proximate Cause—Indiana.

An intervening responsible agent (*e. g.*, an experienced plumber) cuts off the line of causation from the original negligence. *M'Gahan vs. Gas Co.*, 140 Ind., 335 (1894); S. C., 29 L. R. A., 355; citing *Cuff vs. Ry. Co.*, 35 N. J., 17; S. C., 10 Am. Rep., 205; *Ry. Co. vs. Keighron*, 74 Pa., 320; *Carter vs. Towne*, 103 Mass., 507; *Bartless vs. Light Co.*, 117 Mass., 533; *Fitzgerald vs. Paper Co.*, 155 Mass., 155.

Per HACKNEY, C. J.:

"If it can be said that the escaping gas was the direct and efficient or proximate cause of the injury, to the exclusion of every fact or circumstance that might have operated upon it, and that no agency could have taken it up, and employed it so as to become the dominating and effective cause, then this complaint is sufficient so far as this question is concerned; otherwise, it is not."

"We can say as a matter of common knowledge that the injury was not due to spontaneous combustion, and that it was impossible without some agency acting upon the leaking gas."

And it was ruled generally that a complaint charging a gas company with negligence in failing to cut off the supply of gas from a building in which there was a defective pipe, and denying that plaintiff was guilty of contributory negligence, is insufficient to show that the negligence of the company was the efficient cause of the explosion, and a demurrer to the complaint was properly sustained.

Sec. 460. The Same.

The bursting of a pipe-line used to convey natural gas, the escape of gas therefrom and its penetration through the earth beneath and into a building adjacent thereto, were natural and proximate results of weak and inferior gas pipes and allowing gas to flow into them at high and dangerous pressure. *Alexandria Min. & Ex. Co. vs. Irish*, 16 Ind. App., 534 (1896).

The negligence of defendant must be the proximate cause of the injury, and it is the proximate cause thereof, if it can be properly said to have produced the result complained of, in natural and continuous sequence, unbroken by any efficient, intervening cause. *The negligence charged may be the proximate cause, although not the immediate one*; it is enough if it be the efficient cause which set in motion the chain of circumstances leading up to the injury. *Ibid.*, citing *Reid vs. R. R. Co.*, 10 Ind. App., 385; S. C., 53 Am. St., 391; *Louisville, etc., Co. vs. Nolan*, 135 Ind., 60; *Penna. Co. vs. Congdon*, 134 Ind., 226; S. C., 39 Am. St., 251.

Sec. 461. Contributory Negligence—Burden of Proof.

Contributory negligence is matter of defence, and the *onus probandi* is on the defendant, unless the plaintiff's own evidence sufficiently discloses the fact of contributory negligence. In that event, the plaintiff cannot recover, and, of course, defendant is relieved from the necessity of proving what has already been established by plaintiff's evidence. If, however, the plaintiff makes out a *prima facie* case, without disclosing contributory negligence, the defendant must

assume the burden of making out his defence. *Baker vs. Westmoreland Gas Co.*, 157 Pa., 593 (1893).

An oil miner, killed by an explosion occasioned by his lighted lantern in passing near an oil well, from which he could smell and hear gas escaping, is chargeable with contributory negligence; and the owners of the well are not liable, although they had not exercised usual care. *M'Clafferty vs. Fisher*, 2 Atl. R., 610 (1885).

In *Confer vs. R. R. Co.*, 146 Pa., 31 (1892), sparks from defendant's locomotive had set fire to a car that had been used for carrying tar, and left on a switch by defendant. The fire was thence communicated to an oil tank, thirty-six feet distant, a part of plaintiff's oil-refinery, whereby almost the entire plant was destroyed. Verdict and judgment for plaintiff for \$25,081.36.

Per Curiam:

"While this is perhaps a close case upon its facts, we are of the opinion that the judgment must be affirmed. It could not have been withdrawn from the jury, nor are we able to see any error in the manner of its submission. The learned judge could not have ruled, as a question of law, that the plaintiff was guilty of contributory negligence in erecting his oil tank where he did. The sparks from the locomotive were not likely to set fire to oil in the tank, nor did they do so in this case. The accident would not probably have occurred, had not the defendant company permitted a car, used for carrying tar, to stand on the track opposite to, and near, plaintiff's oil tank. This car caught fire from the sparks of the engine, and was wholly or partly consumed. It was the fire from this car which ignited the oil and caused the destruction of plaintiff's works. The accident could have been avoided by running the car a short distance away *after it had taken fire*. This was eminently a jury case."

Sec. 462. Contributory Negligence—Pipes Outside of Building—Leakage.

In an action against a natural gas company to recover damages for personal injuries suffered by an explosion in a building, it appeared that the building was not supplied with either natural or artificial gas, or with pipes for conducting the same. The defendant had two lines of pipe laid in the street in front of the building, the larger of which was used for general distribution and the smaller for premises near the scene of the explosion. The smaller pipe was within a few feet of the cellar wall of the building. Some months prior to the accident, a sewer-pipe was laid from the rear of the building through the cellar and out beneath the smaller gas-pipe into a main sewer. The soil in the neighborhood was largely sand and gravel. For two weeks before the accident, escaping gas had been detected in the immediate vicinity. The explosion occurred immediately after a trap-door leading into the cellar of the building was opened; and soon afterwards, when the gas-pipe immediately in front of the premises was uncovered, an old rusty break therein was discovered. The evidence as to whether the company had been notified of the escaping gas was conflicting. *Held*, (1) that the case was for the jury; (2) that a verdict and judgment for the plaintiff should be sustained. *Henderson vs. Heating Co.*, 179 Pa., 513 (1897).

Sec. 463. Liability of Company When Work Has Been Done by Independent Contractor.

A natural gas company is not liable for injuries resulting from the negligence of an independent contractor in the laying of its lines, unless it accepted

work which it knew, or ought to have known, was so negligently done as to be unsafe and dangerous.

In the absence of *any* evidence to warrant the finding of an acceptance, formal or informal, it is error to submit the question of an acceptance with such knowledge to the determination of the jury. *Chartiers V. Gas Co. vs. Lynch*, 118 Pa., 362 (1888).

The syllabus does not accurately state the position of the court upon the last point. It represents the court as ruling that "in the absence of evidence *sufficient* to warrant the finding of an acceptance," etc., etc., whereas the language of Mr. Justice STERRETT is as follows :

"To such a submission there could be no possible objection if there was *any* evidence from which the jury were warranted in finding that the work had been accepted by the company and taken off the hands of the contractor ; but unfortunately for plaintiff below, there was not. We have examined the testimony presented to us and find *no* evidence from which the jury was warranted in finding an acceptance, either formal or informal, of the work at the point where the explosion occurred."

Sec. 464. The Same—Pennsylvania Act of May 29, 1885.

And the court adhered to this ruling in a later case, *Chartiers V. Gas Co. vs. Waters*, 123 Pa., 220 (1889), and directed the following point to be affirmed without qualification :

"If the jury should find from the evidence that the digging of the trench, laying of the pipes, filling the trench, etc., was done by Martin Joyce, under the contract in evidence between said Joyce and the Chartiers Valley Gas Company, and that the injury was caused by the negligence of Joyce in doing said work, and before it had been accepted and taken off Joyce's hands by said company, Joyce would be the one liable to plaintiff, and the

verdict in this case should be for the Chartiers Valley Gas Company, defendant."

And this, notwithstanding the act of May 29, 1885, providing that "any company laying a pipe-line under the provisions hereof shall be liable for all damages occasioned by reason of the negligence of said company."

Per HAND, J.:

"We have seen that so far as the immediate facts of this case are concerned, as between the company and the contractor, the former is not liable. Is she liable under the principle that an express statutory obligation is inferred from which she cannot be relieved? We can discover no such clause in the act of assembly referred to. The only sentence referred to is where the act provides that 'any company laying a pipe-line under the provisions of the act shall be liable for all damages occasioned by reason of the negligence of said company.' Certainly no duty is imposed by this language; no express or definite obligation is laid upon the company as regards what work she shall do or how she shall do it. * * * The judgment of the court (in a case cited) clearly puts the case upon the fact of a statutory duty absolutely created. There is in this case no ordinance of the city shown which creates such a duty."

Cf. *Reynolds vs. Braithwaite*, 131 Pa., 416 (1890), affirming the liability of one having work done for him under contract, *exercising control* of the mode of doing the work and *participating in and approving* the acts of the contractor.

Sec. 465. The Same—Indiana.

A company using natural gas, which flows through a pipe over a highway crossing, cannot escape liability because the contractor who laid the pipes has not yet formally turned over the plant to the company or fully

completed his contract. *Lebanon Light, Heat & Power Co. vs. Leap*, 139 Ind., 443; S. C. 29 L. R. A., 342 (1894).

Sec. 466. Ohio—Revised Statutes, Section 3561 a.

In *Ohio Gas Fuel Co. vs. Andrews*, 50 Ohio State Reports, 695 (1893), 29 L. R. A., 337, the plaintiff in error was engaged in transporting in pipes, natural gas to the city of Youngstown, and underground, along its streets, to supply its inhabitants with fuel; the defendant in error owned valuable improved real estate in said city, the improvements of which were substantially destroyed by an explosion of the gas while in course of transportation along a street of said city adjacent thereto.

The trial court gave certain instructions, the effect of which was to render the company liable if the explosion was the proximate cause of the injury, although the jury should entirely exonerate it from negligence in connection therewith.

Said BRADBURY, J.:

“The question of how strictly one who undertakes to transport through or along the highways of populous districts, or to store adjacent thereto, subtle and dangerous substances, like natural gas, should be held to the duty of absolutely controlling it, is both interesting and important; but we are relieved from the duty of discussing it in the case before us by the provisions of the statute under which the plaintiff in error was authorized to transport natural gas through the streets of Youngstown at all. That statute reads as follows: ‘* * * But said company shall be liable for any damages that may result from the transportation of the same.’ This language is explicit and unambiguous. This court is asked to add to the language chosen by the legislature the word ‘negligent,’ so that the statute may read: ‘But said company shall be liable for any damages that may result from the negligent transportation of the same.’

“Upon principles of universal application, the company would be held liable for any damages that might result from its negligence in transporting natural gas through the streets of a city. Therefore, to construe the statute as the plaintiff in error contends, would deny it any operation or effect whatever. We think that when the subtle and dangerous qualities of this fluid are considered, together with the long existing, and perhaps still unsettled, controversy that has claimed the attention of courts and text-writers, both in England and in this country, respecting the liability of those who deal in dangerous substances, for damages caused by them, the absence of the word ‘negligent’ in the act declaring the liability of the plaintiff in error has great significance, and can only be reconciled with a legislative purpose to impose upon the company *the duty of absolutely controlling* this substance when it should introduce it into places where, if it escaped control, it would menace the lives and property of others who had no control over it, and who were without fault themselves contributing to the injury.”

Sec. 467. Province of Court and Jury.

Upon the general subject of the right of the court in certain cases to take the case from the jury, we may add to what has already been said, the remark of Mr. Justice GREEN in *Allegheny Heating Co. vs. Rohan*, 118 Pa., 223 (1888):

“If there was no evidence to prove negligence, it was not for the jury, but for the court to decide the case by a specific instruction to return a verdict for the defendant. No principle of the law is more familiar or more deeply rooted in our system of jurisprudence than this. It would be a mere affectation to cite authorities.”

The following, however, to the same effect may be noted: *Baker vs. Westmoreland Gas Co.*, 157 Pa., 593 (1893); *Stoughton vs. Mfrs. N. G. Co.*, 159 Pa., 64 (1893); *Prichard vs. Gas Co.*, 2 Pa. Super. Ct., 179 (1896). And a substantially similar practice obtains in New York, Ohio and Indiana.

Sec. 468. Concurrent Negligence—Injured Party may Elect his Defendant.

Where an explosion is caused by a stranger negligently striking a match in a cellar full of gas, and the presence of gas in the cellar is due to the negligence of the gas company, the person injured has his redress against either of the wrong-doers, or both, at his election. *Philadelphia Co. vs. Koelsch*, 152 Pa., 355 (1893) ; following *Carlisle vs. Brisbane*, 113 Pa., 544 (1886).

Sec. 469. Recovery Over Against Original Wrong-Doer.

A natural gas company which is compelled to pay damages for personal injuries caused by the leakage of gas from a defective pipe may recover from a street railway company whose negligent excavation in the street caused the pipe to break. *Philadelphia Co. vs. Traction Co.*, 165 Pa., 456 (1895) ; citing *Brookville vs. Arthurs*, 130 Pa., 501 (1890) ; *Same vs. Same*, 152 Pa., 334 (1893).

Where an action was brought against the District of Columbia to recover damages caused plaintiff by the negligent condition of a gas box, the property of a gas company, and the gas company was notified and given an opportunity to defend, and a trial was had resulting in a verdict and judgment for the plaintiff against the District, which the District is obliged to pay, the District has a cause of action against the gas company resulting from these facts. *Washington Gas Light Co. vs. District of Columbia*, 161 U. S. R., 316 (1896).

Sec. 470. Defective Pipes—Contributory Negligence.

A gas company which uses a cracked and defective elbow in connecting its conducting-pipe with the plumbing of a dwelling-house, which elbow the company is repeatedly called on to repair so as to prevent the leaking of the gas, and which it fails to repair by the removal of the elbow or effectually closing the crack known to exist, is liable for injuries sustained by reason of the explosion of the escaping gas, in the absence of contributory negligence.

Where a gas company has been notified by the occupants of a dwelling-house of a defect in such elbow, and sends its agent to repair same, and he, after professing to have made the necessary repairs, informs the family that all is safe and assures them that the odor of gas is from a gas-post on the street, a member of the family remaining in the house, who is injured by an explosion of the gas, is not thereby guilty of contributory negligence. *Richmond Gas Co. vs. Baker*, 146 Ind., 600 (1897).

Per HOWARD, J.:

"Even if it could be shown, as appellant argues, that Thomas Crabb or his wife (relatives with whom appellant lived) were negligent, such negligence could not be imputed to appellee; she could be charged only with any negligence of which she had herself been guilty. *Town of Knightstown vs. Musgrove*, 116 Ind., 121; *Miller vs. Louisville, etc., R. W. Co.*, 128 Ind., 97; *Lake Shore, etc., R. W. Co. vs. M'Intosh*, 140 Ind., 261."

Sec. 471. Defective Flue—Undue Increase of Pressure—Trespass.

If a furnisher of natural gas negligently increases the pressure in a consumer's pipe so beyond the accustomed pressure that it overheats the stove of

the customer and, without the latter's fault, sets fire to his house and destroys it, he is liable to the consumer for the amount of his damages. *But*, if the house catch fire by reason of a defective flue, then the furnisher of the gas is not liable, although the consumer had no notice of the defect, and it is error to refuse so to instruct the jury at the request of the furnisher. *Alexandria M. & E. Co. vs. Painter*, 1 Ind. App., 587 (1891).

In such case the furnisher of the gas cannot escape liability on the ground of a contract between him and the consumer that if a bill for gas furnished was not paid when due, the former had the right to cut off the supply, and that the fire occurred after the bill was due. In such case the consumer is not a trespasser. *Ibid.*

Sec. 472. Liability of Purchaser of Plant of Tortfeasor.

A person who has purchased the plant of the furnisher after the fire occurred is not liable for the damages, and the contract of purchase is inadmissible in evidence, even though the purchaser assumes in the contract all the liabilities of the vendor, *no allegation of such assumption being made in the complaint. Ibid.*

Sec. 473. Notice.

Ample notice of a leak in a high-pressure main of natural gas is given to the owner of the main by a continuance of the leak for several years, and also direct information from line-walkers. *Consumers' Gas Trust Co. vs. Perrego*, 144 Ind., 350 (1895).

Sec. 474. The Same.

As tending to prove notice to a natural gas company of the unsafe condition of its pipe-line, in an action for a death resulting from an explosion of gas escaping from its pipes, it was proper for plaintiff to show by the mayor of the city in which the lines were located, that before the explosion he informed one of the defendant's men who had *control* of the line, of the unsafe condition of the pipes, and that he thought the high pressure line should be taken up. *Alexandria M. & E. Co. vs. Irish*, 16 Ind. App., 534 (1896).

Sec. 475. Notice.

If officials know, or ought to know, previously to the time of an accident or explosion, that a pipe or main is in defective condition, and fail to have it repaired, it is such a default as to fix liability. *But notice or knowledge will be assumed* where the circumstances are such that the authorities, by the exercise of proper and reasonable diligence, might have known of the defect which caused the damage. *Kibele vs. Philadelphia*, 105 Pa., 41 (1884).

It was also *held* in this case that the evidence of a patrolman and other witnesses, that they had smelt gas in the immediate neighborhood of plaintiff's house a week or ten days before the explosion, should have been submitted to the jury to determine whether the municipal officers, by the exercise of proper and reasonable diligence, could have discovered the defect in the gas main in time to have had it properly repaired before the explosion.

Sec. 476. Failure to Test Pipes.

Under the provisions of Sec. 5707, Burns' R. S., Ind., 1894, *et seq.*, that natural gas companies shall conduct gas only through sound wrought or cast-iron pipes and casings, tested to a pressure of at least 400 pounds to the square inch and that such companies shall not convey natural gas through such pipes at a pressure exceeding 300 pounds per square inch, the failure of such a company so to test its pipes to a pressure of at least 300 pounds is in violation of said statute, and such company is thereby guilty of negligence, for which it is answerable in damages for all resulting injuries. *Ind. N. G. & O. Co. vs. Jones*, 14 Ind. App., 55 (1896).

Courts know that natural gas is highly explosive and combustible, and that it will explode when ignited by fire. *Ibid.*

Sec. 477. Failure to Inspect Oil Pipes.

The pipe of an oil company, used for the transportation of its oil, was laid within a few feet of a street sewer connecting with other city sewers. A city contractor in constructing a city sewer, exposed a section of the pipe, and in blasting rock, struck and broke it apart at one of the joints, from which, fourteen days later, oil escaped, causing personal injuries resulting in the death of the party injured.

There was no evidence of negligence on the part of the company in the mode and manner of laying the pipe, but it had neglected to inspect the same for the aforesaid period of fourteen days, at the end of which time the pumping of oil into this pipe was continued for a period of two and a half hours before the

pumping station was notified by the employees of the company at the other end of the pipe where oil was to be discharged, of the fact that no oil was being discharged therefrom at the latter point. Upon a verdict and judgment for plaintiff, *held*, that the question of negligence was properly left to the jury. *Lee vs. Vacuum Oil Co.*, 54 Hun (N. Y.) 156 (1889).

Sec. 478. Evidence—Admissions of Agent.

To render the declarations of an agent admissible in evidence against his principal, it must appear, either (1) that the agent was specially authorized to make them; or (2) that his powers were such as to make him the general representative of his principal, having management of the entire business; or (3) that the admissions were part of the consideration of a contract; or, (4) if they were non-contractual, that they were part of the *res gestæ*. *Oil City Fuel Supply Co. vs. Boundy*, 122 Pa., 449 (1888).

Declarations of a lineman of a natural gas company made to a person about to connect with the pipe-line, to the effect that the gas had been stopped off by a valve and that there would be no danger in making a connection, are admissible in an action to recover damages for injuries caused by an explosion resulting from the gas being forced at an extraordinary pressure through the main, before plaintiff's plumbing was in a condition to keep it from his house. *Baker vs. Westmoreland Gas Co.*, 157 Pa., 593 (1893).

Per STERRETT, C. J.:

"If the evidence tending to show Dillon's relation to the company defendant was believed by the jury, he was, *pro hac*, the representative of the company, acting within the scope of his

employment, and hence his principal would be affected by his acts and declarations. To have excluded the testimony of the witness would have been error."

Sec. 479. Declarations of Workman.

Where gas was turned on prematurely, though after a workman—defendant's employee, but not the special officer authorized to give such permission—had said that all was safe, a regulator being defective, an explosion resulted. *Held*, that the jury must determine from the evidence whether plaintiff was authorized to turn on the gas.

If plaintiff turned on the gas without authority from defendant or any of its officers or agents, and had been warned not to do so, defendant is not liable. Nor would it be if it had turned it on and plaintiff was notified before the fire that it would not be safe, and still continued to use it. *Kohler Brick Co. vs. N. W. O. N. G. Co.*, 11 Ohio C. C. R., 319 (1896).

Sec. 480. Expert Testimony.

The opinion of an expert who neither knows nor can know more about the subject than the jury and who must draw his deductions from facts already in the possession of the jury, is inadmissible. *Lineoski vs. Coal Co.*, 157 Pa., 153 (1893); following *Ins. Co. vs. Gruver*, 100 Pa., 266 (1882).

A witness testifying to the depreciation in the value of land because of the supposed increase of the cost and danger of mining coal due to the laying of a pipe-line three feet below the surface of the ground, must show knowledge or experience or some other means of information as to the width of the strip of

coal required to support the pipe-line before he is allowed to testify on that subject. *Wallace vs. Jefferson Gas Co.*, 147 Pa., 205 (1892).

Further, the opinion of a witness as to the probability of a pipe-line breaking when the coal beneath it is removed, based merely upon theory, and not upon any known instance in which a pipe-line had ever subsided or a pipe broken for want of support, is merely speculative and should be excluded. *Ibid.*

Per GREEN, J.:

"All of this testimony was merely speculative, imaginary, theoretical, and the most of it extremely doubtful, and founded upon possibilities which were remote and uncertain, yet the great bulk of the plaintiff's testimony on the subject of damages was made up of just this kind of proof. We think it comes within several of our decisions declaring that testimony of such character should be excluded." Citing *Searle vs. R. R. Co.*, 33 Pa., 57 (1859); *Ry. Co. vs. M' Closkey*, 110 Pa., 436 (1885); *R. R. Co. vs. Balthasar*, 119 Pa., 472 (1888); *Chambers vs. South Chester*, 140 Pa., 510 (1891); distinguishing *Penn Coal Co. vs. Versailles Gas Co.*, 131 Pa., 522 (1890).

Sec. 481. Latent Defects in Highway—Township Not an Insurer.

Where the owner of adjacent property ran a small natural gas pipe under a highway in such a manner that the same was exposed at the bottom of the gutters, and the pipe was after six weeks broken by a passing team, and within an hour afterwards a person passing with a light was injured by an explosion of gas, the township is not liable, there being no evidence that its authorities had any knowledge of the existence of the pipe up to the time of the accident.

A township is not an insurer against all defects or obstructions, latent as well as patent, in the public highway. *Otto Township vs. Wolf*, 106 Pa., 608 (1884); citing *Rapho vs. Moore*, 68 Pa., 404 (1871):

“Where the defect in a lawful structure is latent, or is the work of a wrong-doer, either express notice of it must be brought home to the corporation or the defect must be so notorious as to be evidence to all passers, when the corporation is charged with constructive notice.”

Sec. 482. Evidence—Highway—Fright of Horse.

The latest Pennsylvania case in point is that of *Potter vs. Gas Co.*, 183 Pa., 575 (1898). Plaintiff, while driving along a highway, which he traveled almost daily, was thrown from his cart and seriously hurt by reason of his horse taking fright at the scraping of the wheel against a two-inch iron pipe, part of defendant's feed-line, at the side of the road. Either from the effect of changes in the weather on iron, or by physical force, the pipe had been moved from its original position which was about two feet horizontally from the wagon-track on the highway, and was thrown in a curve so as to be over the track about a foot. It was shown that this had been the situation of the pipe for at least some weeks, and, perhaps months, before the accident. There was a verdict and judgment for plaintiff, affirmed on appeal. It was *held* (1) that it was proper to admit evidence that some time prior to the accident another horse of quiet temper had been frightened at a similar noise; (2) that it was proper to admit evidence that the pipe had been seen to be out of place for a long time by an ordinary traveler, and until two or three weeks before the accident; (3) that it was proper to permit the

plaintiff to testify that up to the time of the injury, he had no knowledge of any other person coming into collision with the pipe, and (4) that the entire question of negligence and contributory negligence was for the jury.

Sec. 483. In Crossing Streams, Natural Gas Pipes Should be Laid Beneath the Bed.

In *Omslear vs. Philadelphia Co.*, U. S. Dist. Ct., W. D. Pa., 35 Pitts. L. J., 4 (1887); S. C., 31 Fed. R., 354, the defendant company having authority under the laws of Pennsylvania to lay and maintain pipes for transportation of natural gas across a river, laid an eight-inch main across and *resting upon* the bed of the river, wholly exposed, so as to interfere with the free and safe passage of boats. It was *held* that the pipe should have been buried underneath the river bed, and as laid it was a wrongful obstruction to navigation.

Having wrongfully placed in the channel of the river a gas main which was exposed to rupture by steamboats running foul of it, defendant could not be heard to say that the ill-consequences experienced by libellants were such as could not be foreseen.

Sec. 484. Master and Servant—Risks of Employment.

In an action brought by an employee to recover for injury resulting from the explosion of gases in a tank, in which paraffin was being heated by the application of steam, it appeared that the explosion was caused by the act of the plaintiff, while carrying a lighted lantern, in raising the lid of a tank to cool the

contents before adding fresh material, and that the plaintiff had had a practical experience of a year and a half in the performance of his duties. *Held*, that from his experience he must have become acquainted with the properties of the substances with which he was engaged, and with the generation of explosive gases therefrom, and with the fact that it was unsafe to bring fire into contact with these gases, and that defendant was not liable. *Benfield vs. Vacuum Oil Co.*, 75 Hun, 209.

The master is not required to exercise the highest possible diligence to instruct his servant in every conceivable particular of the circumstances in which he may be placed, or in every possible detail of his conduct in the performance of his duties. He may assume that the servant brings to the work ordinary intelligence and powers of observation, and the capacity to learn something from observation and experience. It is his duty, nevertheless, to instruct the servant against dangers incident to his work, but this extends only to such dangers as are known only to the master himself, or which are reasonably to be apprehended from the nature of the employment. *Ibid.*

And the same court held in *Nichols vs. Brush, etc., Co.*, 53 Hun., 137, that where a laborer was ordered into a still to repair it and was killed by the explosion of gas which had entered *in the absence of a stopcock*, and was ignited by a candle carried by him, he did not assume the risk, although it was absolutely certain that gas from other stills in use would turn back into the empty still in the absence of a stopcock. He had a right to expect that his master would furnish him with a reasonably safe place within which to work.

Sec. 485. The Same—Risks of Employment*—Suitable Appliances.

Where it is the duty of a field superintendent of a natural gas company to supervise the testing of wells, he cannot recover from the company for injuries caused by the explosion of a valve on a fitting which he himself selected from the company stock and adjusted for the test. *Toohy vs. Equitable Gas Co.*, 179 Pa., 437 (1897).

WILLIAMS, J.:

"The shutting and testing of this well was part of the business of the plaintiff, as the field superintendent of the defendant company. The risk it involved was a risk incident to his business, a risk which he assumed in accepting the superintendency of field work. The duty of the company was to provide a stock of suitable fittings from which the plaintiff could select such as were needed in any given case. The duty of selecting was on him. *Ross vs. Walker*, 139 Pa., 42. If he selected such as were really too light for the pressure to which they were to be subjected, the negligence was not that of the defendant, but was his own. If the explosion was due to some concealed defect in the fittings, such as reasonable care could not detect or provide against, whatever might be the responsibility of the manufacturer, the explosion was as to the gas company and its employee, an accident due to causes not under the control of either."

* Whether a field superintendent or other executive officer of a producing oil or natural gas company, firm or individual, sustains to those employed under him the relation of a fellow-servant, has not been decided. It has been held repeatedly in Pennsylvania that a mining-boss *is* such a fellow-servant of his subordinates, under the Mining Acts of 1870, 1877 and 1885 (*Lineoski vs. Coal Co.*, 157 Pa., 153 (1893), and cases cited), and in Indiana, under its Mining Act of 1891, that he is not. *Linton Coal and M. Co. vs. Persons*, 11 Ind. App., 264 (1894); following *Brasil vs. Young*, 117 Ind., 520 (1889).

Sec. 486. Oil Refining—Inevitable Accident—Burden of Proof.

The business of oil refining being a lawful business, and not the maintenance of a nuisance, the company is not responsible for an inevitable accident in the carrying on of its business. So, where the plaintiff's vessel was burned by reason of an explosion in defendant's petroleum works, it was *held* incumbent on the plaintiff to show affirmatively that defendant had been negligent, and had not used ordinary care in the management of its business, whereby the explosion occurred. *Cozulich vs. Standard Oil Co.*, 122 N. Y., 118 (1890).

Sec. 487. Presumption.

The presumption is, until the contrary be shown, that every man has performed his duty, and it is incumbent upon one alleging a failure in this respect, as the foundation of a right of action, to prove facts from which an inference of negligence may properly be drawn; and proof of the mere fact that an accident has happened will not, in the absence of any contractual relations between the parties, authorize such an inference. *Ibid.*

To the same effect, *Stewart vs. R. R. Co.*, 40 W. Va., 188 (1896.)

In cases where the injury complained of results in the death of the injured person, the law presumes that such person exercised the measure of care that it was his duty to exercise. But this presumption is *prima facie* only and may be rebutted by proof of the acts of the injured person or of the circumstances surrounding the accident. *Connerton vs. Canal Co.*, 169 Pa., 339 (1895).

Sec. 488. Absence of Proof—Presumption—Federal Court.

The case of *Warn vs. Davis Oil Co.*, Dist. Ct., S. D. N. Y., 61 Fed. R., 631 (1894), is an exception to the uniformity between the State and Federal decisions in oil and gas cases, elsewhere adverted to. It is directly contrary to the New York and Indiana authorities, the ruling being that an explosion in a building, unaccompanied by any explanation by the owner, or by evidence of care on his part, furnishes a presumption of negligence, and places on the owner the burden of showing reasonable care taken to avoid the accident.

Per BROWN, *Dist. J.* :

"In the court of appeals of this State, it was *held* in the case of *Cozulich vs. Oil Co.*, 122 N. Y., 118; 25 N. E., 259, that an explosion in a building, unaccompanied by any explanation by the owner, or by any evidence of care on his part, furnishes no presumption of negligence; and this was reaffirmed in *Reiss vs. Steam Co.*, 128 N. Y., 103; 28 N. E., 24. The opposite conclusion, as held by Judge WALLACE, in the case of *Rose vs. Transportation Co.*, 11 Fed., 438, seems to me the more sensible and just, and more in accordance with legal principles and analogies. The same ruling was made on appeal in the Circuit Court in the case of *The Sydney*, 27 Fed., 119, 123. This ruling is based upon the principle (of wide application in the law of torts), that injuries which do not ordinarily happen when reasonable and proper care is taken to avoid them, afford a presumption of negligence, and place upon the defendant the burden of proof that ordinary and reasonable care was taken to avoid the accident; and also upon the principle of evidence, that he who has peculiarly within his power the means of producing evidence of reasonable care, shall be required to produce it."

The opinion concludes, however :

"The cause of the accident is, in fact, unexplained. Either an accidental fire, or some violation of the rules by workmen in smoking, or carrying a light, seem the only imaginable

causes. * * * The evidence offered by the defendants shows a business not specially dangerous when prosecuted with reasonable care; that there were suitable regulations, arrangements, and reasonable care exercised; and that there was no neglect by the defendants to enforce such regulations. *I think this sufficiently rebuts the prima facie presumption of negligence; and on this ground the libel should be dismissed, but without costs.*"

Sec. 489. Shade Trees.

A natural gas company lawfully occupying a street with its mains and pipes is bound to use its rights and to conduct its operations so as not to inflict injury upon neighboring property. *Evans vs. Keystone Gas Co.*, 148 N. Y., 112 (1895). Affirming S. C., 72 Hun., 503.

A verdict for plaintiff in an action for the destruction of shade trees alleged to have been caused by the negligent escape of gas from a main in an adjacent street is not to be deemed the result of conjecture merely, where there was evidence showing the decay of trees and grass in the vicinity of and coincident with the leakage of a large amount of gas from the time the main was laid until it had been recalked, and a healthful growth after the recalking. *Ibid.*

Sec. 490. The Same.

Gas works are embraced within a class of erections which are not within the ordinary and usual purposes to which real estate is applied; and where plants are destroyed by gas escaping from street mains and entering greenhouses upon private property, the owner thereof may recover from the gas company owning such mains the damage caused by the escaping gas. *Armbruster vs. Gas Light Co.*, 18 N. Y. App. Div., 147 (1897).

ADDENDA

TO CHAPTER III

THE NATURE AND RIGHT OF PROPERTY.

Sec. 28a. The *Quantum* of Property of a Life-tenant in an Oil Well.

There is no conflict between *Koen vs. Bartlett*, 41 W. Va., 559; 23 S. E. R., 664, and *Wilson vs. Youst*, 28 S. E. R., 781. In the former the grantor had, *before making the conveyance* under which the life-estate arose, given a right to drill for oil. This it was that enabled the court to speak of the mines as "lawfully opened and worked during the existence of the estate," as well as of mines opened when the life-estate began. There was not merely a life-estate without anything said as to oil wells. There was a life-estate in lands in which, as a matter of fact, there were no wells when the life-estate began. But the *right to bore* had been granted before that time.

In *Wilson vs. Youst*, when the life-estate began, not only was there no well drilled, but *no right to drill* had been given or contemplated by the testator. In that case the drilling was authorized and done after the life-estate began by an agreement between the remaindermen and the infant life-tenants by their

guardian, acting under an order of court. The question was only how the oil produced should be divided and, as we have seen, was ruled by *Blakley vs. Marshall*, 174 Pa., 425.

Sec. 41a. Right of Way.

The general rule, as stated by Bainbridge (Chap IV., Sec. 2), is that where a man having a close surrounded with his own land grants the close to another in fee, for life or years, the grantee shall have a right of way over the close to the grantor's land, as incident to the grant, for without it he cannot derive any benefit from the grant. So it is where he grants the land and reserves the close to himself.

"But," Bainbridge adds, "in all well-drawn instruments, there are express powers with respect to ways." See *Clark vs. R. R. Co.*, 28 Vt., 103; *Farnum vs. Platt*, 8 Pick., 339; S. C., 19 Am. Dec., 330; *Rankins' Appeal*, 16 Atl. R., 82 (Pa.); *Gumbert vs. M'Cracken*, 18 Atl. R., 1068 (Pa.)

Necessity merely cannot *create* a right of way independently of some former unity of ownership of the two parcels or of an implication of a grant or reservation of such a right or of a right established by prescription. Note to Bainbridge, M. & M., 66; citing *Ogden vs. Grove*, 38 Pa., 487; *Tracy vs. Atherton*, 35 Vt., 52.

Whitaker vs. Brown, 46 Pa., 199 (1863):

"And so also the right of way expressly annexed to the estate in the coal, was saved by the exception and descended to the heirs. The law would have given it if the parties had not expressly reserved it."

Ibid, p. 298 :

“ In respect to the right of way, he (BAYLE, J.) in *Earl of Cardigan vs. Armitage*, 2 B. & C., 197, quoted the rule from the Touchstone, that when anything is excepted, all things that are depending on it and necessary for obtaining it, are excepted also.”

E. g., in operating for coal, the easements of drainage, flooding, etc. 15 Am. & Eng. Cyc. Law, 586.

The principles which apply to rights of way upon the surface are equally applicable when such rights of way happen to be underground. *Pomeroo vs. Salt Co.*, 37 Ohio St., 520.

Sec. 41b. The Same—Extinction by Non-user.

Where a right of way is claimed by grant, it cannot be extinguished by a disuse or lost by non-user, unless there be a denial of title or other act on the part of the adverse party to quicken the owner in the assertion of his right, and an abandonment of a servitude created by deed cannot be inferred from non-user by grantee. *Twibill vs. Railway Companies*, 3 Pa. Super. Ct. R., 487 (1896).

Sec. 41c. Drilling Through Coal for Oil or Gas.

The owner of land who has granted to another person the coal under his land, has a right, apart from any reservation in the deed, to access through the coal to the *strata* underlying it. *Chartiers Block Coal Co. vs. Mellon*, 152 Pa., 286 (1893).

This is one of the most remarkable cases that have arisen under the law of mines and minerals. As

Mr. Chief Justice PAXSON remarked, "It was a case of first impression, and of very grave importance. * * * A new question, and one that is full of difficulty. * * * We find ourselves upon a new road, without chart or compass to guide us, and we propose to move slowly."

The facts were briefly that in 1881, the appellant company bought of the owner of the surface all the coal under 187 acres of land with the usual mining rights and privileges. The grantor reserved to himself no right, privilege or easement in the coal, and no right of way through the coal from the surface to obtain gas or oil, or any other substance. It afterwards appeared that the coal was underlaid with the oil and gas-bearing sand, which could only be reached by laying wells from the surface through the *strata* of coal. The surface owner made leases for oil and gas purposes, and the lessees began at once to drill. A bill was then filed by the company to restrain the defendants from drilling the wells already commenced, and also any others that would pass through the coal, complainant alleging that defendant had no right to drill the wells, and, further, that in any event, it was impossible to drill them in such a manner as to allow the removal of all the coal without exposing the mine to leakage from the gas from said wells and rendering the mining operations so hazardous to complainant's property and employees as to injure and depreciate, if not destroy, the value thereof.

The lower court refused a preliminary injunction against the drilling of *any* wells on the tract of land which, at the date of the decree, *had been drilled* through what was known as the Pittsburg vein of coal, and also refused to enjoin from drilling wells on said tract where they would not pass through the

Pittsburg vein but would pass through a lower vein of coal. But it did award an injunction against the drilling of wells which *would* pass through the Pittsburg vein, and required the defendant to execute and deliver to plaintiff his bond in the penalty of \$10,000, conditioned that in putting down any wells then in process of drilling, or which might thereafter be drilled, the defendant should protect the coal and property of complainant and also complainant's employees; for the use of the best methods, devices and appliances in the construction and operation of such wells and for the plugging of the same upon abandonment. Subsequently the decree was modified so as to remove the injunction from the two wells which had been commenced, but which had not gone down through the Pittsburg vein, upon defendant's giving bond as stated. The company appealed, asking the Supreme Court to award the preliminary injunction.

The fact that the case stands practically alone in American reports, the far-reaching consequences involved, the well-considered opinion of the majority of the court and the strong reasoning of three of the seven justices who desired to carry the ruling farther, make absolutely necessary a perusal of those opinions. Without it the position and ruling of the court cannot possibly be grasped. It is out of the question to make what would be at once a comprehensive and accurate abridgement of the opinions.

Sec. 41d. The Same.

In *Rend vs. Venture Oil Co.*, 48 Fed. R., 248 (1891), an application for a similar order had been

refused by the U. S. Circuit Court for the Western District of Pennsylvania, REED, J., saying, *inter alia* :

“The relative rights and duties of the plaintiff as owner of the coal and mining privileges, and the owner of the surface and underlying portion of the land, and the defendant as lessee, are exceedingly difficult of definition, and ought not to be hastily determined upon a preliminary application, especially as the State courts are at present trying to define those rights as rules of property under the law of the State of Pennsylvania.”

See, also, *Robbins vs. Guffey*, 48 Phila. Leg. Int., 462.

FORMS.

I.

OIL LEASE.

Articles of Agreement,

Made and concluded this day of A. D.
18 , between
of the first part, and
of the second part: WITNESSETH, that the said party of the first
part, for and in consideration of the covenants and agreements
hereinafter contained on the part of the said party of the second
part, to be paid, kept and performed, hereby grant, bargain,
demise, lease and let to the party of the second part, heirs
and assigns for the term of from
the date hereof the following described real estate, situate, lying
and being in the

Giving and granting to the party of the second part,
heirs and assigns, the full, free and exclusive possession of said piece
of land during said term of , for
all purposes necessary to develop the same by procuring oil ,
and taking it therefrom, together with the right to put up and keep
tanks thereon for the storage and transportation of oil and to
erect thereon any buildings that the party of the second part may
require. The party of the second part, heirs and assigns,
shall have the full and free right to sub-divide said tract of land into
any number of smaller lots and pieces, and sub-lease the whole or
any part of said tract of land, and at the termination of this lease
or before, to remove all machinery and fixtures thereon. The party

of the second part shall have the right to take and use the necessary timber for erecting derricks.

IN CONSIDERATION of which the said party of the second part, heirs and assigns, covenant and agree as follows, viz :

1st. To go upon said land, and within to commence one well and bore the same feet deep, unless oil is sooner found in paying quantities ; and further, if said well is not put down, or works developed within from the date hereof, then this agreement to be null and void

2d. To deliver as royalty to the party of the first part herein part of all oil obtained and saved from said land

3d. To keep true and correct books of accounts, showing the production of each and every well, the shares or proportion due the party of the first part, which books shall be kept open and free to the inspection of all parties interested in this agreement.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals the day and year first above written.

Sealed and delivered in the
presence of

[SEAL]

[SEAL]

[SEAL]

[SEAL]

STATE OF PENNSYLVANIA, } ss:
COUNTY OF
BE IT REMEMBERED, ETC.,

WITNESS my hand and seal.

[SEAL]

OIL AND GAS LEASE.

MADE THE day of A. D. 189 ,
BETWEEN

and State of _____ of the County of _____
of the second part ;

Township, County and
:State of , bounded and described as follows, to-wit :

TO HAVE AND TO HOLD the said premises, for the said purposes only, unto the party of the second part, for, during and until

the full term of _____ years next ensuing the day and year above written, or while oil or gas is found in paying quantities.

The said party of the second part hereby covenants, in consideration of the said grant and demise, to deliver unto the said party of the first part the full and equal _____ part of the petroleum oil discovered and produced on the premises herein leased, and deliver the same _____ to the credit of the party of the first part, free of charge.

It is further agreed that if gas is obtained in sufficient quantities and utilized, the consideration in full to the party of the first part shall be _____ Dollars for each and every well drilled on the premises herein described, per annum, payable within sixty days after completion of such well, and thereafter yearly in advance, at _____

The well or wells to be located in the hollows or at such places as; not to interfere with the cultivated portions of the land, and all pipe lines to be buried two feet under ground ; also to pay all damages to growing crops by the laying of said pipe lines.

The said party of the first part to fully use and enjoy the said premises for the purpose of tillage, except such part as shall be necessary for said operating purposes. The said party of the second part is further to have the privilege of using sufficient water from the premises herein leased to run the necessary engines, and the right to remove all machinery and fixtures placed on the premises by them, together with the right of ingress and egress.

The party of the second part shall have _____ from the date hereof to complete one well on the premises without paying rental or damages for failure to do so, and at the expiration of said term of _____ year the said party of the second part shall have the right and option to continue this lease from year to year by paying to the party of the first part _____ per acre per annum on the _____ day of _____ each year, at _____ until one well is completed on the above described premises, which shall release the party of the second part from all payment of further rental during the term of this lease.

It is further understood and agreed by and between the parties hereto that a failure to make any one of such payments, or to complete one well on the premises, shall render this lease null and void,

and the same shall be fully ended and determined by and between the parties, and the party of the first part shall have no right, nor right of action in law and equity against the party of the second part for the recovery of any rent, damages or otherwise thereafter.

It is understood by and between the parties to this agreement, that all conditions between the parties hereto shall extend to their heirs, executors and assigns.

IN WITNESS WHEREOF, we, the parties of the first and second part, have hereunto set our hands and seals the day and year first above written.

Signed, sealed and delivered
in the presence of

[SEAL]

[SEAL]

[SEAL]

[SEAL]

STATE OF

COUNTY, } ss:

On this
before me

day of

A. D. 189 ,
in and for said

County, personally appeared the said
above named, etc.

Assignment.

KNOW ALL MEN BY THESE PRESENTS, that
of the County of _____ and State of _____, the
party of the second part in the within Contract, for and in con-
sideration of the sum of _____ dollars, do hereby assign,
transfer and set over the said Contract unto

with all the property, rights of property, interest, powers and pos-
sessions of every kind therein conveyed, to have and to hold the
same to the said _____ heirs and
assigns forever.

IN WITNESS WHEREOF, _____ have hereunto set _____ hand and
seal this _____ day of _____ in the year 189 _____.

Signed, sealed and delivered)
in the presence of) [SEAL]
[SEAL]
[SEAL]

STATE OF _____ } ss:
COUNTY OF _____

On this _____ day of _____ 189 _____, before
me, a _____ in and for said County, personally
appeared the said _____
and acknowledged that _____ did sign and seal the foregoing
assignment of lease, and that the same is _____ free act and deed.
Given under my hand and _____ seal the day and year
aforesaid.

[SEAL]
419

III.

(Form II, while in common use, is manifestly drawn from the standpoint of the lessee—notably the last sections—to secure to him the right to operate with the minimum of risk. The following is submitted as a more equitable adjustment of the rights of owner and operator.)

Articles of Agreement,

MADE the day of A. D.
between of the
in the County of and Commonwealth of
part of the first part, and
of the part of the second part,
WITNESS that the said part of the first part, in consideration of
the covenants hereinafter contained on the part of the said part
of the second part to be kept and performed, ha granted and by
these presents do grant unto the said part of the second part
the right to mine for and obtain petroleum upon and from ALL that
certain piece or parcel of land situate in the Township of
in the County of
and Commonwealth of bounded and described as
follows, to wit :

Containing acres more or less, whereof the said
owns undivided part and the
said owns undivided part ,
To HOLD the said right unto the said part of the second part for
the term of years from the date hereof, upon con-

dition that the said part of the second part keep and perform all and singular the covenants hereinafter contained on part to be kept and performed.

IN CONSIDERATION OF THE FOREGOING GRANT the said part of the second part ha covenanted and agreed, and by these presents do covenant and agree to and with the said part of the first part, heirs and assigns, in manner following, that is to say :

I. That the said part of the second part will commence work under this grant within days after the date hereof and complete one oil well thereon to the depth of or through the oil bearing rock as soon as the same can be done by continuous and diligent drilling ; and will commence a second well thereon within days after the completion of the first well and complete the same to the depth of or through the oil bearing rock within ninety days thereafter ; and drill one other well thereon to the depth of or through the oil bearing rock within every period of days after the time limited for the completion of the second well, until there shall have been drilled one well upon each acres of the said land.

II. That as often as an oil well shall have been drilled upon any adjoining lands, within feet of any line of the land above described, which shall produce oil in paying quantities, the said part of the second part will drill a well upon the said above described land distant from such well upon such adjoining land not more than double the distance of such well upon such adjoining land from the nearest point upon such line, as soon after the completion of such well upon such adjoining land as the same can be done by diligent drilling, unless shall have already drilled a well which shall answer the description of the well herein last provided for.

III. That the said part of the second part will diligently operate all wells drilled by with suitable means and appliances whether in the process of pumping or spontaneous flowing, and yield and deliver to the said part of the first part heirs or assigns one part of all the petroleum which shall obtain

from all wells which shall produce not more than barrels of petroleum per day, and one part of all the petroleum which may obtain from all wells which may produce more than barrels of petroleum per day, so long as and whenever the production shall exceed barrels per day, and when the production shall be barrels per day or less, then one part thereof; the deliveries to be made through such pipe line as the part of the first part may from time to time direct, and the part of the second part shall provide separate tanks for the product of each well, to the end that the pipe line runs shall show the production of each well.

IV. That the said part of the second part will pay all taxes that may be levied upon any increase of the assessed value of the said land over and above the present assessed value thereof.

V. That if , the said part of the second part, shall neglect or fail to drill any of the wells provided for in first covenant above contained within the time therein specified will release and surrender the right hereby granted as to all the land above described except acres around each well, which shall have drilled at the time of such neglect or failure, and if shall neglect or fail to drill any well provided for in second covenant above contained within the time therein prescribed, the part of the first part may drill or cause to be drilled such well without let or molestation of the said part of the second part; and if shall neglect or fail to perform any other of covenants hereinbefore contained when by the terms thereof ought to be performed, the part of the first part may re-enter the premises and dispossess the said part of the second part.

VI. If gas shall be obtained upon the said premises, the part of the second part, shall have the right to use so much as may be required in the prosecution of their operations thereon and the surplus shall be sold under the direction, or with the approval, of the part of the first part and the proceeds of such sale divided in the proportions of one to the part of the first part and to the part of the second part.

All and singular the grant, covenants and conditions herein contained shall bind and be available to the heirs, executors, administrators and assigns of the respective parties in like manner as if fully so expressed in the proper connections.

IN WITNESS WHEREOF the said parties of the first and second parts have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered)
in the presence of

[SEAL]

[SEAL]

IV.

(*Funk vs. Haldeman*, 53 Pa., 229.)

Articles of Agreement,

[illegible]

WITNESSETH that the said party of the first part, for and in consideration of the covenants hereinafter contained on the part of said party of the second part, hath granted and by these presents doth grant unto the said party of the second part, his heirs and assigns, the free and uninterrupted use, privilege and liberty to enter upon that certain tract or parcel of land, bounded and described as follows :

for the purpose of prospecting, digging, excavating and boring, and erecting thereon derricks, tanks, engines or anything necessary for the prospecting, experimenting or searching to find petroleum and of taking the same out of the earth.

The said party of the first part doth further grant unto the said party of the second part the right, privilege and exclusive use of acre of land at and around each oil or gas well that may be sunk by said party of the second part, who is also to have the free ingress, egress and regress on or over said land for himself, his hands, teams, tenants and under-tenants, occupiers or possessors of said oil wells in common with said party of the first part, his heirs and assigns.

The said party of the second part hereby covenants and agrees with said party of the first part that he will use no more land for roads and ways than may be absolutely necessary ; that he will not drill a well within yards of the dwelling of said party of the first part ; that he will commence operations upon said land within days from the date of these presents and will continue with due diligence to operate said land for oil. He further covenants that in the event of his finding such oil in paying quantities, he will pay and deliver to the party of the first part one-eighth part of all the oil that may be obtained from said land. In the event of a failure to find oil in paying quantities and the abandonment of the enterprise, said party of the second part shall have the privilege of removing all engines, tanks, casing and fixtures of every kind, having first taken reasonable precautions as to the plugging of such abandoned wells, the premises to revert to said party of the first part, whose right of tillage is in any event to be uninterrupted, except as to said one acre around each well.

V.

(The following is adapted from *Venture Oil Co. vs. Fretts*, 152 Pa., 451, where it was held to vest lessee with a right to explore for and determine the existence of oil under the land, and if none be found, the right to cease when the explorations are finished and the right abandoned.)

This Lease,

MADE this _____ day of _____
189 , by and between _____ of
_____ party of the first part,
and _____ of
_____ party of the second part, WITNESSETH : that the said party of the
first part, in consideration of the stipulations, rents and covenants
hereinafter contained on the part of the said party of the second
part, his executors, administrators and assigns, to be paid, kept and
performed, has granted, demised and let unto the said party of the
second part, his executors, administrators and assigns, for the sole
and only purpose of mining and excavating for petroleum or car-
bon oil, gas or other valuable mineral or volatile substances, and
for the laying of pipe either under or on top of said surface, for
the transportation of oil or gas (all pipe laid for permanent use to
be buried so as not to interfere with plowing), ALL THAT CERTAIN
TRACT, etc., etc.

It is further agreed that this lease is not to interfere with the
sale of this farm until oil is found, and that the party of the second
part is to stand between the party of the first part and any trouble
or expense with any companies or individuals operating for coal on
or under said tract ; and it is further agreed that no oil or gas wells

shall be drilled within yards of any of the farm buildings without the consent of the party of the first part.

TO HAVE AND TO HOLD said premises for said purposes only unto the party of the second part, his executors, administrators or assigns, for and during the full term of years next ensuing the date first above written.

The said party of the first part is to fully use and enjoy said premises for the purposes of tillage, except such part as shall be necessary for said mining purposes and a right of way over and across the said premises to the place or places of excavating.

The said party of the first part covenants that the party of the second part shall have the right to remove any machinery or fixtures placed on said premises by the said party of the second part. The party of the second part covenants to commence operations for such mining purposes within from the execution of this lease, and when oil is found in paying quantities, to prosecute the same with due diligence to success or abandonment.

VI.

(The following was pronounced in *M'Nish vs. Stone*, 152 Pa., 457, to be not a grant of land or a present leasehold interest therein; not a grant of the mineral in place or under the land, but the right to search for oil and the right to enter and occupy for that purpose and no other. If the search be fruitless, it is at the cost of the explorer. When it is abandoned, the right of entry is gone. But if successful, the explorer becomes a tenant for the purpose of operating, with the right of possession for such purpose. Whether the tenancy exists depends, therefore, upon whether oil or gas is found.)

This Agreement,

MADE, etc.

WITNESSETH that the party of the first part, for the considerations expressed in the agreements and covenants hereinafter set forth and mutually entered into doth lease unto the party of the second part, his executors, administrators and assigns the exclusive right to bore or mine for oil or other minerals on the following described land, etc.

Also the right to enter upon said premises and occupy the same or so much thereof as may be necessary to prospect, bore, mine or otherwise to search for, find and procure oil or other minerals, and as may be necessary for the erection of machinery, store-houses, vat manufactories or other needed buildings, and the right to construct necessary roads to and from said buildings or premises, and the use thereof.

Also the right to divide and sub-divide into as many shares or parts, either by undivided interests or by division and measurement on the ground, as the party of the second part may elect, and the same to sell, transfer or assign at pleasure.

TO HAVE AND TO HOLD, etc.

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ERRATA

To Sec. 132, add "*R. R. Co. vs. Egbert*, 152 Pa., 53."

Sec. 170, p. 145, add "*Weixel vs. Lennox*, 179 Pa., 457."

In Sec. 284, to *Breckenridge vs. R. R. Co.*, add "38 Atl. R., 740 (1897)."

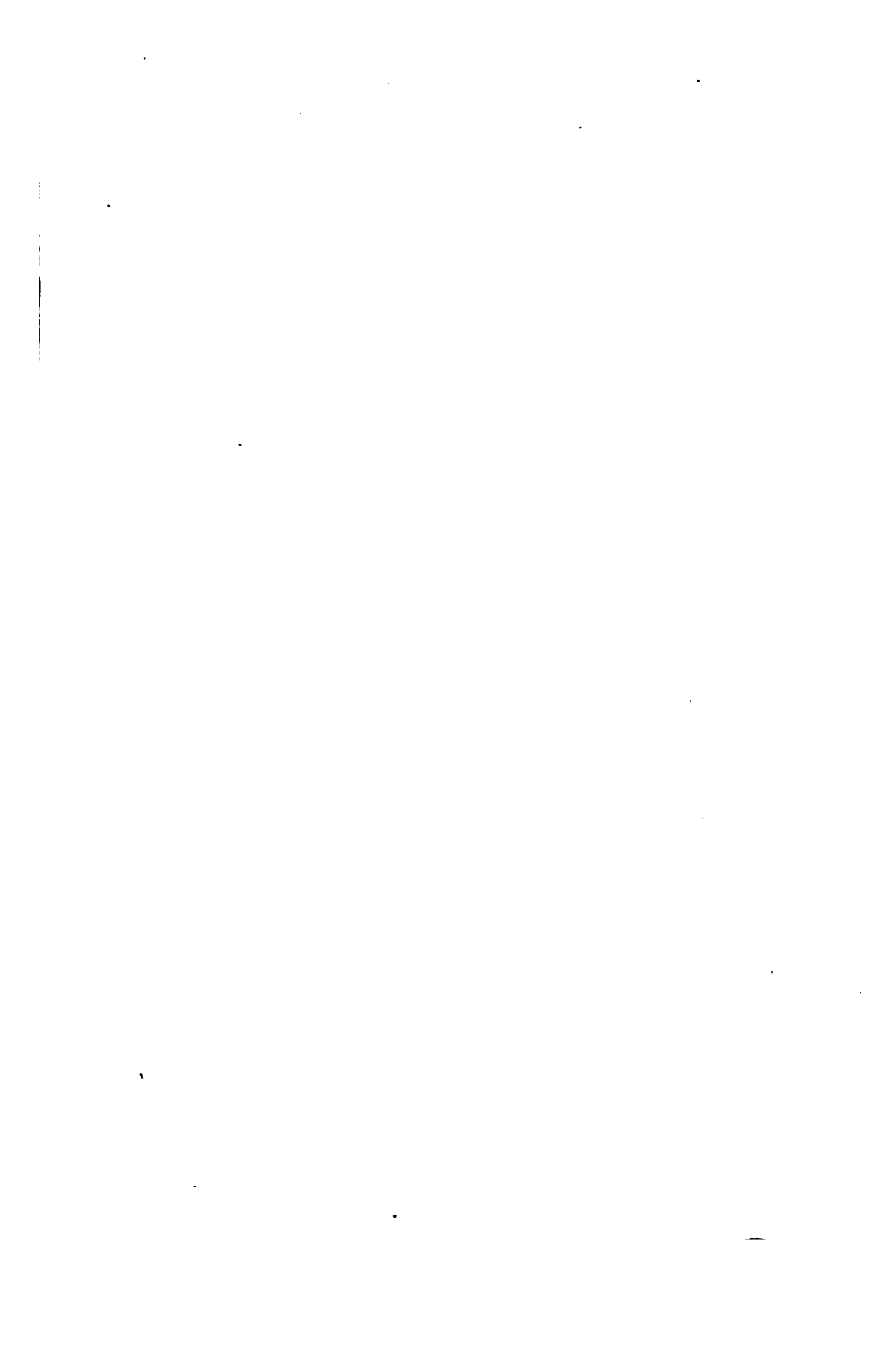
To Sec. 331, add "*Pa. Coal Co. vs. Saunders*, 113 Pa., 146 (1886); Cf. *Collins vs. Chartiers V. Gas Co.*, 131 Pa., 14 (1890)."

To Sec. 333, add "For construction of certain Pennsylvania legislation as to exclusiveness of illuminating gas franchises, see *Com. vs. Illuminating Co.*, 180 Pa., 578 (1897)."

To Sec. 387, add "Cf. *Gavigan vs. Atl. Ref. Co.*, 3 Pa. Super. Ct., 688 (1897)."

Page 131, addendum, for "Sec. 96" read "Sec. 13."

Sec. 413, for "MITCHELL, J." read "WILLIAMS, J."



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